Hail! Langdell!

Paul D. Carrington

Christopher Columbus Langdell (whose career ended a century ago) achieved fame by devising the case method to turn law into a laboratory science divorced from politics and to make his course so rigorous that it would attract able students seeking to test and prove themselves with the severest academic challenge. The method was adapted by many law teachers who were unpersuaded by the idea of law as apolitical science. These included Langdell's colleagues, James Bradley Thayer and John Chipman Gray, who shared Holmes's disdain for the theory. The method survived and flourished despite its theoretical weakness because it worked in practice. No mere rite of passage, it developed numerous traits and skills useful to lawyers, it revealed a true picture of the political and atomized nature of American law, and it nurtured many of the civic virtues that American law teachers have sought to nurture since the time of George Wythe.

When Christopher Columbus Langdell retired as Dean of the Harvard Law School a century ago,[1] he was widely acknowledged a success. He had devised a novel theory of American law, a new method of instruction, and a program of credentialing that made his school a paradigm for American legal education. Charles William Eliot, the Harvard President who had selected Langdell was able to gloat: "If there be a more successful school in our country or in the world for any profession, I can only say I do not know

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1. Langdell resigned as dean in June 1895 and retired as Dane Professor in 1900. 2 Charles Warren, *History of the Harvard Law School and of Early Legal Conditions in America* 469 (1908, De Capo ed. 1970) ("Warren, *History*"). He died in 1906. *Id.* at 479.

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where it is."[2] Indeed, in 1895, the reforms effected by Langdell at Harvard were on their way to becoming standards for an industry.

Yet in the ensuing century, his reputation has not fared well. While his legal theory achieved brief acceptance among some, its adherents were a diminishing group by the time of his retirement. It has not had a serious defender since the death in 1910 of his premier student, James Barr Ames.[3] Later observers expressed the conventional wisdom of the century in proclaiming the theory to be "transcendental nonsense."[4] And the revered Grant Gilmore, reflecting upon it, concluded that Langdell was "an essentially stupid man."[5] Gilmore, like many another, employed the term "Langdellian" unrestrainedly to dismiss the unenlightened.[6] It is emphatically not my purpose here to defend Langdellian theory.

Langdell's method of instruction also met resistance in his own time. Despite evoking hostility from students and lawyers, it gained acceptance in modified form, first by some of his colleagues, then by the elite schools, and later by virtually all American law teachers. But it won only limited approval from disinterested observers commissioned to evaluate it.[7] While, as modified, it has had defenders, the defense has often been circular in its reasoning,[8] and it has seldom been spirited.[9] Some have

2. Quoted in Arthur F. Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817–1867* at vii (Cambridge, Mass., 1967) ("Sutherland, *Law at Harvard*").

3. Cf. James Barr Ames, *Christopher Columbus Langdell, Lectures on Legal History* 467 (1913).

4. Felix Cohen, "Transcendental Nonsense and the Functional Approach," 35 *Colum. L. Rev.* 809 (1935); Calvin Woodard, "The Limits of Legal Realism: An Historical Perspective," 54 *Va. L. Rev.* 689, 720 (1968); see also Robert Gordon, "Legal Thought and Legal Practice in the Age of American Enterprise 1870–1920," *in* L. Stone & G. Geison, eds., *Professions and Professional Ideologies in America 1730–1940* (1983). More gently, Willard Hurst described it merely as "in the bad sense, a schoolman's concept." "Changing Responsibilities of the Law School, 1868–1968," 1968 *Wis. L. Rev.* 336, 336 (1968).

5. Grant Gilmore, *The Ages of American Law* 42 (New Haven, Conn., 1977) ("Gilmore, *American Law*").

6. Thomas Grey accurately portrays Langdell's theory as the "indispensable foil, the parental dogma that shapes the heretical growth of a rebellious offspring." Thomas Grey, "Langdell's Orthodoxy," 45 *U. Pitt. L. Rev.* 1, 3 (1983). It was indeed the foil for several generations of offspring.

7. Josef Redlich, *The Common Law and The Case Method in American University Law Schools* (New York, 1914); Alfred Z. Reed, *Training for the Public Profession of the Law: Historical Developments and Principal Contemporary Problems of Legal Education in the United States with Some Account of Conditions in England and Canada* (New York, 1921) ("Reed, *Training*").

8. There may also be an analogous circularity in Langdell's underlying theory. Grey, 45 *U. Pitt. L. Rev.* at 20–24.

9. For varied, kindly assessments, see Samuel Williston, *Life and Law* 198–200 (Boston, 1940) ("Williston, *Life and Law*"); Karl N. Llewellyn, *The Study of Law as a Liberal Art in Jurisprudence: Realism in Theory and Practice* 377 (Chicago, 1962); Sutherland, *Law at Harvard* 162–63; Marcia Speziale, "Langdell's Concept of Law as Science: The Beginnings of Anti-Formalism in American Legal Theory," 5 *Vt. L. Rev.* 1 (1980); and Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 109–21 (Cambridge, Mass., 1993) ("Kronman, *Lost Lawyer*").

continued to condemn it in unrestrained terms and for a variety of alleged defects.[10]

Langdell's program of credentialing was appropriated by others, with social and political consequences that are still but dimly understood.[11] Although adopted, they are seldom celebrated. On its account, more than any other, Langdell's name has in some minds become associated with whatever is deemed wrong with the American legal profession.[12] It was this aspect of Langdell's disrepute that led Robert Stevens, in concluding his critical history of professional law schools in America, to foretell that "Langdell will continue to be blamed for things he never believed or at least never understood."[13] Also undefended here is that questionable but widely emulated credentialing program.

In this centennial appreciation, I fulfill Stevens's prophecy in a perverse way, by expressing gratitude to Langdell for serving a benign cause in which he may never have believed, by making a contribution that he gave no indication of understanding. In stating my gratitude in such restrained terms, I do not mean to patronize him. He was a practical man who successfully effected the result he was hired to achieve with little wasted motion or thought. Only a person academic to a fault could find evidence of stupidity in such a career.

My salute is, however, limited to Langdell's contribution to the methods of 20th-century American law teachers. Fully to appreciate that contribution, it is important to dissociate it from the flawed legal theory that he employed to justify his method, and from the credentialing program that was said to be required by it.[14] It is the contention of this article that Langdell's method was less radical and more useful than he supposed because of its utility to law teachers working in the tradition established at William and Mary in 1779 of teaching law in support of constitutional democracy. Although Langdell seemed to have sought escape from that tradition, teach-

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10. E.g., Duncan Kennedy, "How the Law School Fails: A Polemic," 1 *Yale Rev. L. & Soc. Action* 71 (1970).

11. Among those who have questioned the effects are Reed, *Training* (cited in note 7); Herbert Packer & Thomas Ehrlich, *New Directions in Legal Education* (New York, 1972); Association of American Law Schools Curriculum Study, *Training for the Public Professions of the Law* (1971), republished as an appendix to Packer & Ehrlich; Robert B. Stevens, *Law School: Legal Education in American from the 1850s to the 1980s* (Chapel Hill, N.C., 1982) ("Stevens, *Law School*").

12. E. g., Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 74–101 (New York, 1976) ("Auerbach, *Unequal Justice*") and *id.*, "What Has the Teaching of Law to Do with Justice?" 53 *N.Y.U.L. Rev.* 457 (1978); David Barnhizer, "The Justice Mission of Law Schools," 40 *Cleve. St. L. Rev.* 285, 296–301 (1993).

13. Stevens, *Law School* 279. When that forecast was expressed in an earlier article he added, even more bitterly: "So much for the demise of legal history." "Two Cheers for 1870: The American Law School," *in* B. Bailyn, ed., *Law in American History* (1976).

14. Grey observed that there was no necessary connection between Langdell's legal theory and his teaching method. 45 *U. Pitt. L. Rev.* at 2 n.3.

ers have employed variations on his methods as means conforming to that distinctively American tradition.

The "case method" as it developed in this century has been a significant means of transmitting the morality of republican politics and law. Many of the teachers employing it may not have observed the pre-Langdell tradition in which they worked. Some were not particularly mindful of their own moral premises even as they shared them with students. Perhaps to distance themselves from their secular origins and traditions, 20th-century academics have been disinclined to speak openly in favor of any moral precepts, even those in which our democratic traditions are rooted.[15] But just as one can write prose without knowing it, so teachers may effect changes in students (and in themselves) without consciously intending them. Indeed, morals may be more prone to change in response to pedagogy that is unself-conscious and hence suggestive rather than insistent.[16]

Some 20th-century law teachers have been unaware of their tie to pre-Langdell tradition because the benign effects of the modified case method were effectively disguised both by its derivation from "transcendental nonsense" and by its apparent relation to questionable credentialing standards. I hope in this article to remove these veils from the moral premises of much 20th-century American law teaching. And I hope thereby at least partially to reclaim for the pre-Langdell tradition the careers of many 20th-century law teachers who may have served that tradition without being always fully aware that they were doing so. And with those still at work, I hope to share my own "rare and unnerving" experience as one of those teachers "who suddenly, in full cry, understand what they are saying."[17]

In part I of this article, I summarize the American law teaching tradition that Langdell seems to have eschewed. In part II, I summarize the social, political, and institutional settings in which Langdell functioned, which explain why Langdell seemed to have sought a new path. In part III, I briefly remind the reader of his theory and method, and of their role in justifying programmatic reforms, adding my voice to the chorus of detractors of the theory. In part IV, I seek to demonstrate that the method was soon separated from the flawed theory; for this purpose, I will sketch the careers and thinking of three of Langdell's contemporaries who rejected the theory but generally approved the method: James Bradley Thayer, John Chipman Gray, and Oliver Wendell Holmes. These three were not only faithful to

15. Except in a few small colleges, American higher education forsook its religious connections between 1870 and 1910. Laurence R. Veysey, *The Emergence of the American University* (Chicago, 1970) ("Veysey, *Emergence of the University*); see esp. 252–59.

16. I take this to be an important theme of Emile Durkheim, *Moral Education: A Study in the Theory and Application of the Sociology of Education*, trans. E. K. Wilson & H. Schnurer (New York, 1960; orig. pub. 1925). It is empirically demonstrable that agendas influence group judgment and decisions. The case method sets an important part of the agenda for the law school class. I will explore its moral influence more fully in part V.

17. F. S. C. Milsom, *Studies in the History of the Common Law* 191 (Oxford, 1985).

the older tradition of American law teaching but also more influential than Langdell with those who came later. In part V, I explain how the teaching method as adapted by teachers such as Thayer and Gray served, and continues to serve, that tradition.[18]

I. THE AMERICAN TRADITION OF UNIVERSITY LAW TEACHING

The American tradition of university law teaching was established in 1779 when Governor Jefferson caused the governing board of the College of William and Mary to appoint George Wythe as Professor of Law and Police.[19] That Jefferson's purpose was candidly political was confirmed by Wythe's title.[20] The governor hoped and expected that Wythe, his own mentor in law, would train a generation of political leaders for the Commonwealth of Virginia sympathetic to the aims of the Revolution then being fought and if possible adhering to Jefferson's political views.[21] There was no English precedent for Jefferson's action.

Jefferson's rival, Alexander Hamilton, was in 1793 animated by very similar motives in helping to cause the appointment of his associate, James Kent, as Professor of Law at Columbia.[22] Acknowledging the dark and de-

18. In an article that is a sequel to this, I will report more fully the demise of Langdell's influence on the writing and teaching of 20th-century law teachers, focusing on the state of legal education in Chicago in 1910. "The Missionary Diocese of Chicago," 44 *J. Legal Educ.* 467 (1995).

19. For a brief account, see Paul D. Carrington, "The Revolutionary Idea of University Legal Education," 31 *Wm. & Mary L. Rev.* 526 (1990).

20. "Police" in the vernacular of the time meant "Politics"; this usage had Greek derivation.

21. Jefferson wrote Madison on 17 February 1826:

> In the selection of our Law Professor, we must be rigorously attentive to his political principles. You will recollect that before the Revolution, Coke on Littleton was the universal elementary book of law students, and a sounder whig never wrote, nor of profounder learning in the orthodox doctrines of the British constitution, or in what were called English liberties. You remember also that our lawyers were then all whigs. But when his black-letter text and uncouth but cunning learning got out of fashion, and the honied Mansfieldism of Blackstone became the student's horn-book, from that moment, that profession (the nursery of our own Congress) began to slide into toryism, and nearly all the young lawyers are now of that hue. They suppose themselves, indeed, to be whigs because they no longer know what whigism or republicanism means. It is in our seminary that the vestal flame is to be kept alive; it is thence to spread anew over our own and the sister States.

Albert E. Bergh, ed., 12 *Writings of Thomas Jefferson* 455–56 (1907).

22. For an account of the beginnings at Columbia, see Julius Goebel, *A History of the School of Law, Columbia University* 9–11 (New York, 1955) ("Goebel, *History*"). Goebel describes the earlier law schools at Yale and William and Mary as adhering to English practice established at Oxford in 1758 with the appointment of Blackstone. Although other historians of American legal education have also assumed that Blackstone was a model, e.g., 1 Warren, *History* 1–187 (cited in note 1), there is no evidence that Blackstone's appointment was in the mind of those creating law professorships in America. Certainly, it was not in the mind of Jefferson, who was no admirer of Blackstone, nor, it seems, in that of Ezra Stiles, the Jefferso-

structive sides of our natures,[23] these political rivals shared the misgiving that popular self-government could be sustained only if its leaders were morally constrained to respect opposing interests and seek common ground, or political fraternity.[24] This misgiving was the premise of those who wrote the Constitution in 1787[25] and was heightened when their generation witnessed the chaos and despotism resulting from the French Revolution, an event confirming their worst fears about the instability of popular self-government.[26] While this concern was more widely shared in the late 18th century, there is little in the events of the two succeeding centuries to diminish that concern unless perhaps it is the moderate success of the stabilizing devices put in place in 1789.

The ratification of the Constitution established for American law and lawyers a political role without precedent in either English or Roman traditions and further magnified the felt need for lawyers who comprehended and valued democratic traditions and the novel idea of constitutional law. Most American colleges existing at the time of the Revolution pursued the shared political purpose of developing such a public profession by teaching law. Harvard was the important exception.

Apprenticeship training lingered from colonial times as the premier method of training lawyers to provide private services. Harvard in 1817[27] and Yale in 1825[28] each tried to develop academic law programs as surrogates for apprenticeships. These efforts were inspired by the moderate suc-

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nian President of Yale whose efforts were the closest model at hand for the initiative of Hamilton. In every recorded instance prior to the establishment of the Harvard Law School in 1815, the stated purpose of the college in teaching law was to respond to the needs of a democratic society for prudent leadership, which was not a purpose associated with William Blackstone. See generally Carrington, 31 *Wm. & Mary L. Rev.* There seems to have been an assumption operative in the mind of Warren and to some extent the minds of other New Englanders that all ideas about American law originated in Old England. Langdell seems to have been under this same disability.

23. Among the sources of this misgiving was the widely read work of Charles de Secondat Montesquieu, *The Spirit of Laws* bk. V. chs. 2–8 ("Montesquieu"), which foretold the doom of republics not led by leadership imbued with the morality of civic virtue.

24. This term is Kronman's (*Lost Lawyer* 93–101; cited in note 9) but was also in use in the French Revolution.

25. It was the same misgiving that gave rise to the Constitutional Convention of 1787. For a lucid account seen through the text of The Federalist Papers, see Garry Wills, *Inventing America* (New York, 1981); for a contemporaneous treatment, see especially 2 John Adams, *A Defense of the Constitution of the Government of the United States* 504–5 (Boston, 1788).

26. Many Americans reacted as did Edmund Burke, *Reflections on the Revolution in France* (London, 1790). E.g., Hugh Henry Brackenridge, *Modern Chivalry*, ed. C. M. Newlin, 563–64 (1937; orig. pub. 1804). See generally B. Fay, *The Revolutionary Spirit in France and America* (New York, 1927). For a contemporized encounter with Judge Brackenridge, see Paul D. Carrington, "Law and Chivalry: An Exhortation from the Spirit of the Hon. Hugh Henry Brackenridge of Pittsburgh (1748–1816)," 53 *U. Pitt. L. Rev.* 705 (1992).

27. Sutherland, *Law at Harvard* 43–91 (cited in note 2); 1 Warren, *History* 278–376.

28. The Stiles plan for Yale is described by 1 Warren, *History* 166–70; and see Frederick Hicks, *Yale Law School: The Founders and The Founders' Collection* (New Haven, Conn., 1935).

cess of the Litchfield Law School,[29] but Litchfield's success was not repeated by Harvard nor equaled by Yale. Despite disappointing results, both thereafter blended practical training in the performance of professional services with the instruction in politics and law that was offered in many other colleges. Thus, Joseph Story was a Jeffersonian[30] appointed at Harvard in 1829 for the purpose not of training apprentices, but to help by his teaching and writing to establish a distinctive *national* legal tradition.[31] He was supported by a colleague assigned responsibility for conducting moot courts and providing other training preparatory for private service.[32] At the zenith of Story's career at Harvard in 1840, the other successful university law-teaching programs were all even more decidedly political in their aims; notable among them was the Law Department of Transylvania University in Lexington, Kentucky, which had been established in 1799 by five former students of George Wythe, and which trained hundreds of young men entering public life in the states west of the Alleghenies.[33] Law study at Transylvania was avowedly preparation for such careers.

University law teaching was in antebellum times often done by judges such as Story. The public morality that these teachers espoused was closely related to classical notions of civic virtue. That morality was elaborated in its application to American life and institutions in 1838 by Francis Lieber, then of the College of South Carolina, who was the only person in antebellum times to devote a full career to law teaching.[34] Lieber described at length, in three volumes, many duties of officers and citizens in a constitutional republic.[35] Reduced to a slogan, his message was: "No duties, no rights; no rights, no duties."[36]

Almost simultaneous with the publication of Lieber's work was the appearance of another by Timothy Walker, the founder of the University of

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29. See generally Marian C. McKenna, *Tapping Reeve and the Litchfield Law School* (New York, 1986).

30. Kent Newmyer, *Supreme Court Justice Joseph Story* 3–36 (Chapel Hill, N.C., 1985).

31. Sutherland, *Law at Harvard* 92–100 (cited in note 2).

32. From 1829 to 1833, Story was supported by John Hooker Ashmun, who served as Royall Professor of Law. Ashmun had been conducting a proprietary school in Northampton and brought his private students with him to study at Harvard. 1 Warren, *History* 424–26, 433–61 (cited in note 1). On Ashmun's death, he was succeeded by Simon Greenleaf, who had practiced law in Portland, Maine, for 25 years. Greenleaf was an effective teacher and scholar and remained at the School until 1850, succeeding Story as the Dane Professor. 1 Warren, *History* 480–543, 2 *History* 131–32.

33. Paul D. Carrington, "Teaching Law and Virtue at Transylvania University: The George Wythe Tradition in the Antebellum Years," 41 *Mercer L. Rev.* 673 (1990).

34. Lieber, *Manual of Political Ethics* (2 vols., Boston) ("Lieber, *Political Ethics*"); *id.*, *Legal and Political Hermeneutics* (Boston) ("Lieber, *Hermeneutics*"). See generally Paul D. Carrington, "The Aims of Early American Law Teaching: The Patriotism of Francis Lieber," 42 *J. Legal Educ.* 339 (1992).

35. For a contemporary account of the qualities required of republican statesmen that strikingly resembles Lieber's, see Kronman, *Lost Lawyer* 53–108 (cited in note 9).

36. 1 Lieber, *Political Ethics* 386.

Cincinnati Law School.[37] In introducing the study of law, he gave as the reason such study merited the effort required of readers:

> We are trying the greatest political experiment the world ever witnessed; and the experience of all history warns us not to feel too secure. A voice from the tombs of all departed republics, tells us that if our liberty is to be ultimately preserved, it is at the price of sleepless vigilance. I refer not to foreign aggression, for this we have nothing to fear; our only foes are those of our own household. Domestic aggression may come from two quarters; from those who govern, or from those who are governed. On the one hand, power is always tending to augmentation. Those who have some, employ it to gain more; and if not seasonably withstood, become too strong to be resisted. And on the other hand, liberty is always tending to licentiousness. The more men have, the more they are likely to want. Being free from many restraints, they would do away with all. Now when dangers threaten, from either of these quarters; when rulers would trample the law under their feet, or mobs would rise to overthrow it; who are the sentinels to give the alarm? Do I assume too much, in saying society looks with confidence to that class of men [and women][38] whose profession it is to watch over the law?[39]

Although most of those teaching law were Whigs supporting the politics of Henry Clay, Lieber's principles and Walker's caution were not partisan and found agreement even among some of a populist persuasion. Some who supported Clay's chief adversary, Andrew Jackson, established the New York University Law School at the very moment that Lieber and Walker were publishing the works just described.[40]

While teachers such as Story, Lieber, and Walker strove to develop a public profession of law, the apprenticeship system perpetuating the private profession was disappearing. That system had never taken root in most frontier states and in the East it was uprooted by Jacksonian populism opposed

37. Walker was a native of Massachusetts and a former student of John Ashmun and Joseph Story. He was active in various law reform movements. His biography is Walter T. Hitchcock, *Timothy Walker: Antebellum Lawyer* (New York, 1990).

38. This insertion is justified in part because Walker was an early advocate of the rights of women and would have welcomed women into the legal profession. See *id.* at 228.

39. *Introduction to American Law: Designed as a First Book for Students* 1–2 (5th ed., 1869). The 11th edition of this work was published in 1905. For an echo of Walker's statement by Langdell's immediate predecessor at Harvard, see Emory Washburn, *Law as an Element of Social Science* (Boston, 1868).

40. The founding teacher was Benjamin F. Butler, a member of the Jackson and Van Buren cabinets. On the founding of the school, see generally Ronald R. Brown, ed., *The Law School Papers of Benjamin F. Butler* (New York, 1987). A law department was also established at the same time at Hamilton College, with a Jacksonian as law professor. Jesse H. Cousault, "John Hiram Lathrop," *in* Dumas Malone, ed., 6 *Dictionary of American Biography* 16 (New York, 1935).

to the self-perpetuation of professions as undemocratic elitism.[41] The system's final doom in New York was sealed by the state Constitution of 1846.[42] By the outbreak of the Civil War, requirements for admission to the legal profession were virtually nonexistent in most states; the profession was therefore open to most white males willing to hold themselves out as literate persons with access to a copy of Blackstone. Academic credentials were almost without value. With few exceptions, antebellum law students did not study law in universities to gain entry to a private profession, or to acquire credentials; if their purpose was serious, they came to prepare themselves for public life.

During the 1860s, two law schools emerged as preeminent, each attracting students by the hundreds. One of these was the Columbia Law School conducted chiefly by Theodore Dwight.[43] His was the first such institution to achieve fiscal solvency. His endeavors were greatly assisted at the outset by the diploma privilege that excused his graduates from the minimal requirements otherwise imposed on those seeking admission to the bar.[44] Much of his teaching served the needs of students planning to practice law privately. But despite its role in preparing students for professional practice, his law school remained very much a political institution. Dwight was in fact selected partly on the recommendation of his colleague on the law faculty, Francis Lieber, who in 1857 had moved from South Carolina to Columbia, there to profess public law. And throughout the 19th century, the Columbia Law School faculty included Lieber's intellectual successors.[45] Dwight was himself involved in the reformist work of the American Social Science Association[46] and politically active as a Republican,[47] often allied

41. "To dignify any one calling by styling it a profession seemed undemocratic and un-American." Roscoe Pound, *The Lawyer from Antiquity to Modern Times: with Particular Reference to the Development of Bar Associations in the United States* 182 (St. Paul, Minn., 1953) ("Pound, *Antiquity*").

42. Samuel Haber, *The Quest for Authority and Honor in the American Professions 1750–900* at 209 (1991), described this 1846 constitution as "the institutional expression of a ruinous confusion of justice with politics." See also Pound, *Antiquity* 223–42.

43. Goebel, *History* 44–68 (cited in note 22). Dwight came to Columbia from Hamilton, where he had been teaching law for 13 years.

44. New York law provided for admission to practice of any graduate of law schools designated by the legislature. The diploma privilege was abolished in New York in 1879. The story is told by Goebel, *History* 104–8, and by William P. LaPiana, *Logic and Experience: The Origin of Modern Legal Education* 83–88 (New York, 1994) ("LaPiana, *Logic and Experience*").

45. Goebel, *History* 68–89. Stevens erroneously inferred that Dwight was "hostile to nonlaw subjects" being taught in his school. *Law School* 39 (cited in note 11). Dwight did resist requiring his students to take Lieber's course or courses taught by Lieber's successors. This opposition surely reflected his concern for enrollment, not a preference for depoliticized law teaching.

46. Mary O. Furner, *Advocacy and Objectivity: A Crisis in the Professionalization of American Social Science, 1865–1905* at 27 (Lexington, Ky., 1975) ("Furner, *Advocacy*"). (Furner erroneously refers to Timothy M. Dwight, the grandfather of Theodore.)

47. He actively opposed antitrust legislation. E.g., "The Legality of Trusts," 3 *Pol. Sci. Q.* 592 (1888).

with William Maxwell Evarts, a lion of the bar, and a sometime cabinet officer and Senator.[48] Together with others in 1870, Evarts and Dwight organized the Association of the Bar of the City of New York and pursued a series of urban reforms that brought them into opposition to Tammany Hall, the malodorous political machine controlling their city.

Columbia Law's rival for national preeminence was the University of Michigan Law School led by Thomas McIntyre Cooley. That institution was provided at public expense by the people of Michigan for the same reasons as those animating Governor Jefferson in 1779.[49] Cooley had been known as a radical "Barnburner" Jacksonian and active supporter of the Free Soil (antislavery) movement.[50] Soon after his academic appointment in 1858, he was elected Justice of the Supreme Court of Michigan. In 1868, he published a book that was for his time the definitive work on American Constitutional Law.[51] His writing on Constitutional Law drew on the published work of Lieber,[52] with whom he shared a strong attraction to cultural and historical explanations of law and legal institutions.[53] Cooley's law

48. The range of Dwight's interest in politics is exhibited in his formidable article, "Harrington and His Influence upon American Political Institutions and Political Thought," 2 *Pol. Sci. Q.* 1 (March 1887). On Evarts' reform activities, see Chester L. Barrows, *Wm. M. Evarts: Lawyer, Diplomat, Statesman* 181–96 (Chapel Hill, N.C., 1941).

49. In 1817, the Michigan Territorial Legislature created a university and, at the behest of the Chief Judge of the Territory, Augustus B. Woodward, directed it to teach law. Woodward's model was the Law Department at the College of William and Mary. Elizabeth Gaspar Brown, *Legal Education at Michigan 1859–1959* at 4–6 (Ann Arbor, Mich., 1959). An early enactment of the Michigan legislature in 1837 reiterated this mandate, and the directive was uttered again in 1851. *Id.* at 10. When at last the law department was established, its stated aim was to prepare democratic leaders. James V. Campbell, *On the Study of Law* (Ann Arbor, Mich., 1859); Address of Thomas McIntyre Cooley and Poem by D. Bethune Duffield on the Dedication of the Law Lecture Hall (Ann Arbor, Mich., 1863). And see Thomas McIntyre Cooley, *The Lawyer's Duty to Be Faithful to His Own Manhood* (Ann Arbor, Mich., 1878).

50. Alan R. Jones, *The Constitutional Conservatism of Thomas McIntyre Cooley: A Study in the History of Ideas* 20–32 (New York, 1987) ("Jones, *Constitutional Conservatism*").

51. *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (Boston, 1868; de Capo ed. New York, 1972) ("Cooley, *Limitations*"). This work was devoted chiefly to state constitutions that were the source of almost all restraints on state government prior to the ratification of the Fourteenth Amendment in 1868.

52. Particularly *Civil Liberty and Self-Government* (Boston, 1853). Cooley referred to Lieber as "that profound thinker." Jones, *Constitutional Conservatism* 109.

53. One bridge between Lieber and Cooley was Andrew Dexter White. White studied at Yale with Theodore Woolsey, "Lieber's most influential disciple." Dorothy Ross, *The Origins of American Social Science* 67 (Cambridge, U.K., 1991) ("Ross, *Origins*"). On the advice of Francis Wayland, White accepted an appointment at Michigan in 1857, two years before the arrival of Cooley. Cooley arrived in 1859, a raw but well-read intellect who shared many interests with White. White left Ann Arbor in 1867 to become the founding president of Cornell University but left behind his star pupil, Charles Kendall Adams. Both White and Adams were lifelong proponents of Lieber's historical method of studying politics. This is evident in White's *The Greater States of Continental Europe* (New York, 1874) and Adams's *Democracy and Monarchy in France* (New York, 1874). Adams succeeded White as President of Cornell in 1885 and moved on to be President of the University of Wisconsin in 1896, where his leadership foreshadowed the development of "The Wisconsin Idea." Veysey, *Emergence of the University* 104 (cited in note 15). Whether White and Adams brought Cooley to Lieber is

school, like Dwight's, was for a time linked to a political science program, in which Cooley also later taught as a historian.[54]

So great was Cooley's eminence that had he not broken with the Republican Party over its increasing support of privilege, it is likely that he would have been appointed to the Supreme Court of the United States.[55] Instead, he was a Mugwump[56] and concluded his career as the founding chairman of the Interstate Commerce Commission.[57] Among Cooley's students at Michigan were numbered literally hundreds of men who would enter public life in states north of the Ohio River or west of the Mississippi.[58]

Thus, for a century, the tradition of university law teaching established at William and Mary remained predominant. While the institutions maintaining that tradition had been few, small, and weak, there was no disagreement in America that popular self-government was at perpetual and grave risk and depended on the wisdom and self-restraint of leaders, or that such leadership would have to be drawn from the members of the bar, or that it was a useful and perhaps vital function of universities to assist in preparing graduates for those public professional responsibilities. Into this established tradition there emerged in 1870 the belated academic career of Langdell, a close contemporary of Cooley and Dwight.[59]

II. CIVIL WAR, STEAM ENGINES, AND THE LAW

A. Postwar America

Despite the efforts of Cooley, Dwight, and Lieber, traditional American law teaching was in the late 1860s encountering difficulty. At least two headwinds were felt.[60]

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not certain, but Lieber's influence on Cooley was substantial. Jones, *Constitutional Conservatism* 104–9.

54. In 1881, Adams founded the School of Political Science earlier designed by White; Cooley succeeded Adams as the dean of that School. Howard H. Peckham, *The Making of the University of Michigan 1817–1967* at 56 (Ann Arbor, Mich., 1967). The program bore a strong resemblance to that established by Lieber and Burgess at Columbia.

55. Jones, *Constitutional Conservatism* 215–16, 252–93.

56. A mugwump was a former Republican who supported Grover Cleveland. See generally Richard Hofstadter, *The Age of Reform* 131–73 (New York, 1955).

57. For an evaluation of his stellar performance as a regulator, see Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* 29, 31 (Cambridge., Mass., 1962).

58. A partial list is on file with the author. It includes Justices Day and Sutherland of the U.S. Supreme Court, numerous U.S. Senators, and many members of highest state courts.

59. Dwight was born in Catskill, N.Y., in 1822; Cooley in Attica, N.Y., in 1824; Langdell in New Boston, N.H., in 1826. Dwight had started teaching law at Hamilton College in 1846; Cooley at Michigan in 1859.

60. These winds of change are also briefly discussed in Paul D. Carrington, "Butterfly Effects: The Political Influence of Law Teachers," 41 *Duke L.J.* 741, 774–86 (1992).

One of these was local to the United States: a moral decline resulting from an epic civil war. The war had inflicted a loss of life among the nation's young males without precedent, at least in the annals of what then described itself as civilization: one fourth of the young men of military age had been killed or maimed, a million of them in a nation having the population of contemporary California or metropolitan Tokyo. That bloody war, by far the bloodiest in American history, stood as a reproach to law and politics in the republic. Constitutional governance had failed to deliver the nation from slavery and had left almost every family bereaved. The nation had therefore in 1870 entered a time aptly described by Gilmore as "Law's black night."[61] The epic corruption of the Grant administration was replicated in the governments of almost every city and state.[62] The appeal of politics to honorable youth was in eclipse.

The second powerful force was transnational in origin: the malaise and despair left by the war was relieved by a current of hope and expectation coming from abroad. Its sources were the ideas of division of labor and of technological progress, ideas that were penetrating the minds of many peoples around the world and offering the prospect of a new world in which many needs and wants would be satisfied with far less effort than could have been imagined only a generation or so earlier.

Perhaps the most important single event in American law in the 19th century had been the development of the steam engine,[63] for that occurrence initiated a long series of labor-saving inventions and discoveries, most of them requiring a measure of special knowledge or training to employ, and each elevating the optimism of men and women that life would be better for succeeding generations. The full implications of this revolution seems to have first struck the English public at the Great Exhibition of 1851: the technology exhibit in the Crystal Palace moved Victoria herself to conclude, "We are capable of doing anything."[64]

By 1870, Victoria's optimism about technology was rampant in America. While it would be almost a century before the term "human capital" would come into vogue,[65] the practice of investing in self-development to create salable skills began a period of rapid growth. This was the genesis

61. *American Law* 41 (cited in note 5). A candle lit during that "night" was the formation of the American Social Science Association in 1865. Charter members included Lieber and Dwight of Columbia; Baldwin, Wayland, and Woolsey of Yale; and Washburn of Harvard, all law teachers. Charles Eliot was also an early member. See Furner, *Advocacy* 10–34 (cited in note 46).

62. For contrasting views of the corruption and its sources, see Robert H. Wiebe, *The Search for Order 1877–1920* at 27–43 (New York, 1967); 2 James Bryce, *The American Commonwealth* 136–46 (2d ed. New York, 1913); *The Autobiography of Lincoln Steffens* (New York, 1931); and William S. McFeely, *Grant: A Biography* 404–36 (New York, 1982).

63. Cooley seems to have been aware of this. Jones, *Constitutional Conservatism* 87 (cited in note 50).

64. James Morris, *Heaven's Command: An Imperial Progress* 196 (New York, 1973).

65. The term is Gary Becker's. *Human Capital* (New York, 1964).

of what would become "the American dream" of perpetually increasing convenience and prosperity.[66] Medicine and engineering led the way to human capitalism, but there was a contagion of interest in technocratic professionalism, in the acquisition of almost any kind of skill that could be said to have roots in scientific empiricism. Beginning about 1870, whole new professions emerged in new fields of public service. New academic disciplines were devised around professional aspirations in education, librarianship, nursing, and social work, all of them claiming some basis in technology.

The Jacksonian hostility to elitism in the professions was put on the defensive by this development. Indeed, it may well have throttled American Marxism in its infancy. Notions of class conflict were in many minds displaced by a new vision of the egalitarian society, that of meritocracy. The hope, if not the fact, of prosperity was offered to almost all, and was made dependent in large part on one's own initiative. As Felix Frankfurter, an immigrant Jewish student in the early years of this century observed, what mattered in a profession or professional school "was not your father or your face," but the excellence of your work.[67]

Americans thus came to prize professional credentials and to confer status on individuals according to the relative elegance of their professional and even their academic attainments.[68] Professional organizations appeared in number, first in localities and then on a national scale. These organizations came to exercise increasing regulatory power over career opportunities in their own fields, often using higher education credentials as the measures of qualification.[69] The American Bar Association appeared in 1878 and began to compete with similar organizations in other professions seeking to elevate professional standards,[70] ostensibly to improve the technical quality of services provided to the public but also to elevate and secure the relative social status of their respective memberships.

One effect of the emergence of technocracy and professionalism was the advent of a large urban middle class that would transform American life, society, politics, and law.[71] Pushing in much the same direction was the strong flow of immigration stimulated by the conclusion of the war, immigration now coming to American cities from American farms, and to America from such new sources as Scandinavia, Poland, and Italy. Succeeding waves of immigrants came to populate urban ghettos, but their offspring moved on, frequently within a generation, to be technocrats of one

66. Veysey, *Emergence of the University* 264–68 (cited in note 15).

67. Harlan B. Phillips, *Frankfurter Reminisces* 26–27 (New York, 1960).

68. For an encapsulation of this feature of American higher education, see *U.S. News & World Rep.*, 21 March 1994, at 66–74.

69. See Magali S. Larson, *The Rise of Professionalism: A Sociological Analysis* 141–45 (Berkeley, Cal., 1977).

70. Charles Warren, *A History of the American Bar* 562 (New York, 1921).

71. See generally Burton J. Bledstein, *The Culture of Professionalism: The Middle Class in the Development of Higher Education* (New York, 1976).

kind or another. A secondary consequence of urbanization may have been further to stimulate the demand for status-conferring credentials, for cityfolk lacking permanent connection to the land seemed to have greater need for the sort of reassurance or self-identification that such credentials can provide.

A secondary effect of technocracy and professionalism was thus to transform American universities. They became in important part what we now recognize as the factories of human capital run by educational entrepreneurs, or "captains of erudition," as Thorstein Veblen described them.[72] The colleges were thus in 1870 on the verge of a great boom; higher education was about to become a major national industry. In substantial measure, at least in some fields, this development could be explained as a response to genuine needs for greater technical competence attainable through academic study.[73] But in some measure, more in some fields than others, the pretense that programs of academic study actually enhanced competence was thin; to that extent, the educational entrepreneurs were responding more to the demand for status-conferring credentials than for competence or virtue.

The impulse to technocracy, joined with the political cynicism of the age, produced a tertiary effect on the thinking of some academic theorists. Notable was the emergence in the academy of social Darwinism liberating its believers from responsibility for the social consequences of law and politics. Herbert Spencer's work appeared in England in 1870,[74] the year of Langdell's appointment and became the rock upon which William Graham Sumner erected a structure of laissez-faire ideology.[75] Associated with that ideology was the precept that the study and teaching of economics should be insulated from all consideration of political consequences.[76]

B. Charles William Eliot, Philistine

Of the "captains of erudition," none was more astute than Harvard's President Eliot. He was 35 when appointed in 1869. A chemist, he was with his age awed by technocracy and the social benefits of competence; his design was to elevate Harvard by empowering its students.[77] He was selected by the governing board because of his impressive energy and a demonstrated

72. Thorstein Veblen, *The Higher Learning in America: A Memorandum on the Conduct of Universities by Business Men* 62–98 (New York, 1918).

73. For a similar account, see G. Edward White, *Tort Law in America: An Intellectual History* 23–26 (New York, 1980).

74. His *Study of Sociology* was published in London.

75. Furner, *Advocacy* 43–45 (cited in note 46).

76. *Collected Essays in Political and Social Science* 3–6 (New York, 1885).

77. Inaugural Address at Harvard College, in 2 Richard Hofstadter & Wilson Smith, *American Higher Education: A Documentary History* 601 (New York, 1961).

interest in teaching method. He took "the reins in his hands . . . as if he were the first man that ever sat on the box" and "turned the whole University over like a flapjack."[78]

The governing board seems to have had cause for wishing its institution so turned. Harvard was at the time of Eliot's appointment somnolent. Even Yale, historically the soul of academic conservatism,[79] was noticeably superior in its efforts to make modern science available to its students.[80] At least one member of the Harvard faculty marveled at the progress then recently made by Michigan in affording the able young people of the West a cafeteria of competences.[81] Graduate study had not yet arrived.

The law school was as stagnant as any part of Harvard. A few months after Eliot's inauguration, its Board of Visitors recommended that "the whole subject" of the Law School "be carefully considered."[82] Within a week, the new President made an unprecedented visit to the School.[83] The following year, the School was proclaimed in an unsigned article appearing in the American Law Review "almost a disgrace" on account of its lack of academic standards.[84]

To turn this flapjack, Eliot selected Langdell.[85] Born in 1826, he had come to study at the Law School in 1851. He was then already a lawyer in his native state of New Hampshire. Recognized as a "book worm if there ever was one,"[86] he was made librarian and research assistant to Professor Theophilus Parsons, working on the Parsons text on Contracts.[87] He remained for three years, twice the usual time, and won recognition among younger fellow students as a genius. One of the undergraduates with whom

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78. 1 Warren, *History* 357 (cited in note 1), *quoting* Oliver Wendell Holmes, Sr.

79. That repute had been based on "Reports on the Course of Instruction in Yale College by a Committee of the Corporation and the Academic Faculty (1828)," published in 15 *Am. J. Sci. & Arts* 297 (1829), generally accepted as the ultimate statement of the case for education limited to the classics, "although there was not an original idea in it." Frederick Rudolph, *The American College and University: A History* 131 (New York, 1962).

80. See generally George A. Baitsell, ed., *The Centennial of the Sheffield School* (New Haven, Conn., 1950); Louise L. Stevenson, *Scholarly Means to Evangelical Ends: The New Haven Scholars and the Transformation of Higher Learning in America 1830–1890* at 67–86 (Baltimore, 1986).

81. F. H. Hedge, "University Reform: An Address to the Alumni of Harvard at Their Triennial Festival," 19 July 1866, *Atlantic*, Sept. 1866, at 296, 299.

82. 2 Warren, *History* 359.

83. *Id.* at 363.

84. 5 *Am. L. Rev.* 177. The article was likely written by the editor of the Review, Oliver Wendell Holmes, Jr. See Mark DeWolfe Howe, *Oliver Wendell Holmes: The Shaping Years* 305 (Cambridge, Mass., 1957). It does, however, refer to a "science of human law" in faintly Langdellian terms.

85. The story of the selection is told in LaPiana, *Logic and Experience* 10–14 (cited in note 44). On Eliot's influence on Langdell, see Anthony Chase, "The Birth of the Modern Law School," 23 *Am. J. Legal Hist.* 329 (1979).

86. Sutherland, *Law at Harvard* 165 (cited in note 2).

87. *Parsons on Contracts* was published in Boston in 1853.

he shared his meals was Charles Eliot (then 18), who was charmed by his brilliant table-talk.[88]

Langdell practiced law in New York for 14 years. He was not successful as a litigator and attracted few if any clients of his own. He did win a reputation as "the best read lawyer in New York";[89] and became a partner to other lawyers who met with clients, adversaries, and courts, while Langdell wrote their legal briefs and memoranda. A recluse then without family, he slept close to his work. It was from this sheltered 14-year experience that he suddenly found himself transported by Eliot into the elevated position of Dean of the Harvard Law School.

Although Langdell now has a place in our history, he manifested little interest in American history, apparently longing for the time of the Plantagenets.[90] And although he occupied for a quarter century a position of political eminence, he manifested little interest in politics. It was said by Samuel Williston, his student and colleague, that Langdell had not much "interest or sympathy with any development of law later than 1850."[91] He avowed an interest in law only "as it is," expressing distaste for efforts to determine what "it ought to be."[92] That distaste enabled him to devise a theory corresponding to the economic theory of William Graham Sumner, a theory seeking to separate law from politics.

Langdell commenced work in 1870 and, in the spirit of Eliot's administration of Harvard, promptly initiated his new teaching method based on this new theory of American law. In 1875, when acceptance of Langdell's reforms was still in question, Eliot explained an operative premise from which Langdell was presumably proceeding:

> An institution which has any legal prestige and power will make a money profit by raising its standard, and that either at once or in a very short time. Its demand for greater attainments on the part of its students will be quickly responded to, and this improved class of students will in a marvelously short time so increase the reputation and influ-

88. 2 Warren, *History* 360 (cited in note 1).

89. *Id.* at 360 (*quoting* Charles O'Conor, a lion of the New York bar).

90. His interest in English history was keen and enduring. Joel Seligman, *The High Citadel: The Influence of the Harvard Law School* 30 (Boston 1978) ("Seligman, *High Citadel*").

91. Williston, *Life and Law* 200 (cited in note 9). But see Christopher C. Langdell, "The Status of Our New Territories," 12 *Harv. L. Rev.* 365 (1899).

92. Letter to Theodore Woolsey, President of Yale University, 6 Feb. 1871, quoted by LaPiana, *Logic and Experience* 77. Langdell wrote Woolsey declining appointment to a committee on jurisprudence of the American Social Science Association. He was in this sense profoundly conservative. Laura Kalman, *Legal Realism at Yale, 1927–1960* at 13 (Chapel Hill, N.C., 1986) ("Kalman, *Legal Realism*"). However, given Langdell's single-minded preoccupation with private law, there was no necessary connection between his legal theory and Social Darwinism or laissez-faire economics. He seems not to have recorded an opinion of social statics or the economics of William Graham Sumner.

> ence of the institution as to make its privileges and its rewards more valued and more valuable.[93]

Thus, the job Langdell was hired by the prescient Eliot to perform was to elevate the status of his school by making greater demands on its students. There was little if any relation between his assigned aims and those political aims for which George Wythe had been hired at William and Mary, or James Kent at Columbia. In this respect, Eliot may be rightly seen, as he feared he might, as a Philistine.[94] He had cast Langdell for institutional status-seeking, not service to the republic.[95]

Yet before condemning Eliot, one ought recall the advice of Holmes: "It is most idle to take a man apart from the circumstances which in fact were his.[96] . . . The inevitable is not wicked. If you can improve upon it all right, but it is not necessary to damn the stem because you are the flower."[97] So counseled, we can endorse the observation of Grant Gilmore that if Langdell (or Eliot) had not appeared when he did, it probably would have been necessary to invent them, for the search for status was commanded by the cultural context in which they lived and worked.

III. LANGDELL'S THEORY AND REFORMS

A. Law without Politics

Thus, if Langdell in fact possessed genius, it was not needed in 1870 to put side by side the imperative of technology and the anathematization of politics that were both then pervading American culture. Together they suggested the marketability of law as an apolitical, value-free, technocratic discipline to be understood only by the anointed after years of study. Had Langdell not done the deed, another would, as Sumner's presence in Economics confirms.[98]

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93. *Quoted in* 2 Warren, *History* 397. The preoccupation of Eliot with the status effects of academic rigor was not exceptional. See Veysey, *Emergence of the University* 98–197 (cited in note 15).

94. 2 Henry James, *Charles W. Eliot, President of Harvard University 1869–1909* at 87 (Boston, 1930), quoting Eliot's letter to William James, 20 May 1894.

95. Eliot's view on Langdell is expressed in "Langdell and the Law School," 33 *Harv. L. Rev.* 518 (1920). There is an incongruence between Eliot's approval of Langdell's theory and his participation in the work of the American Social Science Association, which was reformist.

96. "John Marshall: In Answer to a Motion that the Court Adjourn on February 4, 1901, the One Hundredth Anniversary of the Day on Which Marshall Took His Seat as Chief Justice" *in* Oliver Wendell Holmes, *Collected Legal Papers* 266, 267 (New York, 1920) ("Holmes, *Collected Papers*").

97. Letter to Harold Laski, 9 Dec. 1921, *quoted in* Richard A. Posner, ed., *The Essential Holmes* 115 (Chicago, 1990) ("Posner, *Essential Holmes*").

98. There were others as well as Sumner. See generally William E. Nelson, *The Roots of American Bureaucracy, 1830–1900* at 82–112 (Cambridge, Mass., 1982), and Walt W. Ros-

The notion of apolitical law was not only one for its time, but one long and generally accepted by most nonlawyers, perhaps in any culture, to whom law has perhaps always seemed from a distance more mechanical in its operation than it is known to be by those more familiar with its limits and weaknesses. The *cognoscenti* in most cultures have probably with rare exception been content to allow laymen to suppose their expertise greater than it is. For this reason, it is not wrong to speak of thinking that cleanly divides law from politics as orthodox, perhaps even "classical."[99]

However, despite its timeliness and attraction to laymen, Langdell's technocratic vision of law was an idea doomed to a short life in America, for among lawyers sharing a constitutional political role, it was certain that some would see at once, and that most would soon see, that the vision was an inaccurate perception of the American circumstance, even in an age of technology. The association between law and politics in America law was far too intimate to be long denied.

If the seed of his theory was thus infertile, Langdell nevertheless planted it, proclaiming law to be a pure science. Science was not a new word as applied to learning in law. The jurisconsults in the baths at Rome had proclaimed their discipline to be a science,[100] and so had many since.[101] But in 1870 "science" had acquired new meaning rooted in empirical methodology. Its requirements could no longer be satisfied by mere orderliness in the structure and organization of a body of knowledge. Langdell therefore proceeded to build his career on the vulnerable premise that law is or can be an empirical science. He asserted in the face of formidable contrary evidence not only that "[L]aw is a science; [but that] all the available materials of that science are contained in printed books."[102]

By analogizing the law library to the chemistry lab, Langdell treated judicial decisions as experiments. By logical induction from these experi-

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tow, *Theories of Economic Growth from David Hume to the Present* (New York, 1990) ("Rostow, *Theories of Economic Growth*"); Furner, *Advocacy* (cited in note 46); and Ross, *Origins* (cited in note 53).

99. Grey, 45 *U. Pitt. L. Rev.* (cited in note 6). Grey credits Duncan Kennedy for the term "classical" as applied to Langdellian formalism in America arising as early as 1850 and dying no later than 1940. *Id.* at 2 n.6. See also Morton Horwitz, *The Transformation of American Law 1870–1960* at 9–32 (New York, 1992) ("Horwitz, *Transformation*"). This would indicate the term "pre-classical" for the more realistic thinking of earlier generations of Americans, Whig theorists being specified. *Id.* at 38 n.47. I quibble with the term as misleading. It suggests greater durability and strength in the moment of formalism than I perceive. Among thoughtful lawyers, it was a mere fad. I am also disconcerted by the identification of Francis Lieber as a classicist. *Id.* at 29 n.24. Lieber has far more in common with contemporaries such as Michelman, Sherry, Sunstein, and Kronman than with Langdell. See Carrington, 42 *J. Legal Educ.* (cited in note 34).

100. The origins of the term are explored in Fritz Schulz, *Roman Legal Science* 63–72 (2d ed. Oxford, 1967).

101. On the use of the term in antebellum America, see LaPiana, *Logic and Experience* 38–54 (cited in note 44).

102. *Quoted in* Sutherland, *Law at Harvard* 175 (cited in note 2).

ments, one could expect to derive the few true principles of law. Perhaps surprisingly to those who assume Langdell to have been the source of most legal conservatism manifested since his time,[103] he had limited regard for *stare decisis*. He substituted for that doctrine *stare principiis*.[104] Cases not consistent with the principles that he detected by induction were simply wrong and should be disregarded by later courts and by lawyers. They were experiments that had failed to apply correct logic; good law was good metaphysics.

Most of the cases from which Langdell's students were told to induce these principles were English. A part of the context in which Langdell worked was the traditional Anglophilia that pervaded New England (so-called not by accident). Van Wyck Brooks aptly observed that Bostonians on Beacon Hill and its environs were never wholly reconciled to the American Revolution, but almost as much as the people of Edinburgh retained a sense of belonging to English culture and an instinctive receptivity to ideas migrating from the banks of the Thames.[105] While the Unitarian revolution had divested Harvard of its Puritan origins and constraint,[106] it had not liberated it from its emotional ties to the old sod. That American public law, the structure of American legal institutions, and the openness of the legal profession were all (at least in part) conscious rejections of English traditions tended to escape the notice of Bostonians.

It may have been James Barr Ames, Langdell's premier student, who detected the link between Langdell's methods and the theory of John Austin, the English legal philosopher of the previous generation.[107] Austin's theory proceeded from the premise that law is the command of the sovereign and can therefore be understood by analysis that is internal to those commands.[108] Law as Austin envisioned it is indeed a pure science in the same sense as chess, requiring of its masters great intellect, but no knowledge beyond the four corners of the board on which it is played. That English jurisprudence was Austinian gave to New Englanders credence that

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103. Kalman, *Legal Realism* 13 & 120–21 (cited in note 92), is among those who identify Langdell with political conservatism.

104. Williston, *Life and Law* 205 (cited in note 9). For closer analysis of Langdell's view of precedent, see Grey, 45 *U. Pitt. L. Rev.* at 24–27 (cited in note 6).

105. "In short, [New England intellectual life] was still colonial forty years after Bunker Hill. English culture had a right of way that no one thought of challenging, and every Boston boy was taught to regard Pope and Burke as unapproachable." Van Wyck Brooks, *The Flowering of New England 1815–1865* at 10 (New York, 1936).

106. Samuel Eliot Morison, *Three Centuries of Harvard, 1636–1936* at 225–28 (Cambridge, Mass., 1936).

107. Langdell was certainly aware of Austin at the end of his career. See his "Classification of Rights and Wrongs," 13 *Harv. L. Rev.* 537 (1900). Holmes saw Hegelian influence in Langdell, but was careful not to suggest that Langdell had ever read Hegel. Book Note, 14 *Am. L. Rev.* 223 (1880).

108. "The existence of law is one thing, its merit or demerit another." John Austin, *The Province of Jurisprudence Determined*, ed H. L. A. Hart, at 184 (London 1955) ("Austin, *Province of Jurisprudence*"). The work was first published in 1835 but was not circulated in the United States until 1861.

American law should be the same. Herbert Wechsler has recently reminded us that there were in fact in the early years of this century American lawyers who thought of law as such a closed system.[109] They were the intellectual progeny of Austin as well as Langdell.

Contracts became the queen science of Langdell's law school because the law of contracts less frequently intersected social or political issues that might impair the disinterest of the legal scientist. In part, the attraction of Contracts lay in the fact that almost any person or firm making promises might break them, or might be disappointed by the performance of promises received in exchange. Most persons could be envisioned either as contract breakers or contract enforcers. Doctrine could therefore be shaped with little regard for the identities of the persons involved. This was somewhat less true of the law of Property and of noncontractual obligations then gaining recognition as "Torts," which first appeared in Langdell's curriculum in 1871.[110] It must have been a difficult challenge for the first Torts teachers to lead a discussion of such matters as the fellow servant rule without taking notice of its social and economic implications.[111] For a brief time, Constitutional Law was not taught at Harvard Law School, presumably because of the manifest impossibility of discussing the subject without regard for its political consequences.[112] Only at the end of his career did Langdell manifest the least interest in the Constitution, but he did on that occasion succeed in addressing an issue laden with political consequences with antiseptic indifference to those consequences.[113] He was able to the last to maintain the position that legislation is not law.[114]

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109. Norman Silber & Geoffrey Miller, "Toward 'Neutral Principles' in the Law: Selections from the Oral History of Herbert Wechsler," 93 *Colum. L. Rev.* 854, 858 (1993). Duncan Kennedy seems to fancy that there are many surviving specimens; he alleges that the Langdell fallacy is "the intellectual core of the ideology" of contemporary legal education. Kennedy, "Legal Education and the Reproduction of Hierarchy," 32 *J. Legal Educ.* 591, 596 (1982). The allegation appears to rest on a conflation of those who think law is not politics with those who think law is not merely politics. And see Richard A. Posner, "Legal Scholarship Today," 45 *Stan. L. Rev.* 1647 (1993); *id.*, "The Deprofessionalization of Legal Teaching and Scholarship," 91 *Mich. L. Rev.* 921 (1993). Judge Posner attributes to all professionalism in law a "deep-seated belief in the autonomy of law as a subject of thought and practice."

110. 2 Warren, *History* 376 (cited in note 1).

111. Cooley did not try. In *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contracts* 635 (Chicago, 1879) ("Cooley, *Torts*"), he emphasized the "high importance" of the social policy underlying the rule.

112. 2 Warren, *History* 409–13.

113. Christopher C. Langdell, "The Status of Our New Territories," 12 *Harv. L. Rev.* 371 (1899); see also *id.*, "The Northern Securities Case and the Sherman Anti-Trust Act," 16 *Harv. L. Rev.* 539 (1903).

114. Langdell, "Dominant Opinion in England during the Nineteenth Century in Relation to Legislation as Illustrated by English Legislation, or The Absence of It, during That Period," 19 *Harv. L. Rev.* 151 (1906).

B. Pure Law and Teaching Methodology

If law was obliged to be an empirical science, it followed that students should conduct their own laboratory experiments by reading cases for themselves. Assigning students to read cases was nothing new, but requiring them to read them as class preparation and to make their own inductions was. There was likewise nothing new about requiring law students to recite before their fellows; the "catechetical" method had been in general use long before Langdell asked a student to recite upon a case. But to expect students to explain and justify an induction from what they had read was a new technique in classroom instruction. Students could be driven to do this only if Langdell withheld his own inductions; otherwise, they would relax and await his authoritative interpretations. And that would not be science.

Langdell's classroom discussion proceeded at a deliberate pace, covering every point raised in every case read, but generally leaving the students to rely upon their own judgments as to the correct inductions to be made from their "experiments." At first, this method was strongly resisted by almost all the students, many of whom questioned the competence of a teacher who was so seldom informative. What do we care, many asked, what our classmates think about a dissenting opinion? Attendance was sparse, and "impromptu indignation meetings" were frequent.[115] Student indignation was doubtless elevated as students came to realize that the year's end examination would be rigorously graded and that a substantial portion of them might be dismissed on the basis of their performance on those examinations.[116] After all, previous generations of Harvard Law students had not been subjected to the indignity of examinations. It was, however, not Langdell's purpose to make life easy for his students; quite the contrary, it was Eliot's stated purpose to challenge them, for only thus could value be imparted to the School's credential, and that was Langdell's primary assigned objective.

Langdell courageously stayed his course despite the criticism, and gradually gained acceptance for his method, proving the accuracy of Eliot's prediction, but it was a full decade before he enjoyed the fruits of his patience. James Barr Ames, one of the few students who admired Langdell's teaching, was appointed to the faculty upon his graduation in 1873 and became the

115. Charles Warren, *Centennial History of the Harvard Law School 1817–1917* at 34–35 (Cambridge, Mass., 1917) ("Warren, *Harvard Centennial*"); Franklin G. Fessenden, "Rebirth of the Harvard Law School," 33 *Harv. L. Rev.* 493, 497–501 (1920).

116. For a review of their arguments against final examinations, see Seligman, *High Citadel* 32–33 (cited in note 90). The first examinations were administered in 1872; 45 students first-year students sat for them and 3 failed. 2 Warren, *History* 385. Those who failed were advised that they would not receive a degree, although they could remain a second year. A majority of the students did not sit for the examinations but left school without a degree. This, however, was no change from past custom. *Id.* at 382 n.1.

intellectual and professional heir of his mentor.[117] For almost a decade, only Langdell and Ames employed his method of conducting a class.[118]

This "scientific" method necessitated the making of casebooks, for only by that device could students be required and expected to read the same cases at the same time and thus be enabled to discuss them together. Langdell's book was a collection of sparingly edited judicial opinions, shorn of the headnotes often provided by editors to guide the reader, and organized to reveal the evolution and elaboration of what he, Langdell, identified as sound legal doctrine. It was chiefly in the organization of the casebook that Langdell hoped to guide his budding scientists to discover for themselves the true principles of law.[119]

C. Related Reforms: Curriculum and Admissions

Langdell also presided over the extension of the law school curriculum to three years. Many students who had studied law at Harvard or elsewhere before 1870 had limited their work to a single year or less.[120] Harvard's curriculum was in 1870 a two-term curriculum with courses offered in alternate years to both first- and second-year students. Langdell divided the first- and second-year curricula, adding a few courses such as Torts.

In 1876, the Harvard faculty voted to extend to three years the period of study required for a law degree. Given the curriculum available at the time, only Langdell and his most ardent disciples could have thought that professional law study needed to be thus prolonged to provide students with the full benefits of academic preparation for professional work. To fill out three years, students were required to take extended courses in Agency, Bailments and Carriers, Bills and Notes, Contracts, Corporations and Partnerships, Equity, Evidence, Pleading, Real Property I, Real Property II, Sales, Torts, and Trusts and Mortgages. Criminal Law and Procedure was the only public law course regularly offered at Harvard in the late 1870s.[121] Given the redundancy, it is unsurprising that many students were disin-

117. The background of Ames's appointment is described by LaPiana, *Logic and Experience* 15–16 (cited in note 44). As LaPiana suggests, it may have been part of Eliot's purpose thus to weaken the influence of the profession on the professional school.

118. Sutherland, *Law at Harvard* 185 (cited in note 2). William A. Keener of the Class of 1877 was appointed in 1881 and joined Ames and Langdell in its use. Holmes was appointed in 1882 and for a brief time used the case method in teaching Torts. 2 Warren, *History* 428–32.

119. On the early difficulties of securing publishers for casebooks, see John Henry Schlegel, "Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor," 35 *J. Legal Educ.* 311, 317–18 (1985).

120. As did Roscoe Pound at Harvard as late as 1889–90. For an account of his year, see Paul Sayre, *The Life of Roscoe Pound* 78–84 (Iowa City, 1948).

121. 2 Warren, *History* 409–13 (cited in note 1).

clined to complete the three-year course or that Langdell could find no effective inducements to keep them.[122]

To justify the three-year requirement, a rationale was required. Apparently the best available was that the complete lawyer needed training in all aspects of private law and that no training could be regarded as appropriate that did not examine its subject with excruciating care through the scientific method Langdell had devised. Without the case method, Langdell's three-year law school was a play without a hero.

It deserves emphasis that the three-year requirement was ordained by the social forces previously described. The scientific case method was something to say on behalf of a step that perhaps needed to be taken and certainly would be taken to protect the status of the profession. More importantly, medical schools were moving in the direction of a four-year residency requirement, and such fields as social work and education were imposing requirements equal to those traditionally observed in law schools. These changes reflected the fact that technological competence was in universal demand. Had law schools not responded to that pressure, it was not unlikely that the relative status of the profession would have declined, perhaps substantially. It was for this reason alone that the organized bar quickly lent its support for the three-year requirement.[123]

Langdell also presided over a steep elevation in admission requirements. In the past, the admission requirements at Harvard as elsewhere had been male gender,[124] literacy, and a willingness to pay tuition. Langdell introduced an admission test and began to require undergraduate instruction for those not passing the test. The requirement was elevated by stages, the final goal of a degree requirement being achieved in 1900.[125]

Even the elevation of admission requirements could be seen to be related to the scientific theory and the case method, for the theory and method demanded active learning and therefore depended to some extent on the intellectual maturity of students. At least insofar as the admissions requirements produced a more mature group of students, they might be expected better to withstand the emotional rigor of the program.

On the other hand, if law was to be a pure science, an internally complete discipline requiring little or no comprehension of its social, economic and political context, then a program of four years of undergraduate study could be regarded as quite unnecessary. One need not attend college to be-

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122. In 1871, tuition was $150 for the first year, $100 for the second, and $50 for the third. Sutherland, *Law at Harvard* 180.

123. Stevens, *Law School* 58–59 (cited in note 11). Warren writes even of "bitter opposition." 2 Warren, *History* 382.

124. The gender requirement had been dropped by most of the public law schools during Langdell's time. See Paul D. Carrington, "One Law: The Role of Legal Education in the Opening of the Legal Profession since 1776," 44 *Fla. L. Rev.* 501, 551 (1993).

125. 2 Warren, *History* 468–69.

come a chess master. In truth, the degree requirement had more to do with the status of the Harvard Law credential than it had to do with the content of the curriculum. And its critics protested on precisely that ground.[126]

The combined effects of these reforms on Harvard Law School became visible in the 1880s as hundreds and then thousands of young men would be drawn to Cambridge in the hope and expectation that their status and career would be assured by the Harvard Law credential. We can, however, be reasonably certain that relatively few students were attracted to Langdell's institution because they shared his ideas about the nature of law or because they relished the pleasures of his scientific case method or because they wished to forgo an extra year or two of earnings, although no doubt some were attracted by the challenge of withstanding what was reputed to be demanding teaching. Eliot had been right: the best way to increase demand for legal education at Harvard was to make it less available.

D. Secondary Consequences of Programmatic Reform

There were secondary consequences of Langdell's reforms that may have been unforeseen. One was the intellectual isolation functionally linked to the Austinian conception of law, and intensified by the longer period of study. The isolation may have had a useful effect in enhancing the professional identity and commitment of students in much the same way that the isolation of boot camp contributed to the making of United States Marines.

But isolation intensified the intellectually narrowing effect of the training. The intellectual breadth brought to their work by earlier leaders of the profession[127] came to be treated in the minds of some of Langdell's students as a lesser, subprofessional attainment, or at least separate from the goal of the professional lawyer-technocrat. Admittedly, the law school under the leadership of Joseph Story had given little more than lip service to its stated goal of intellectual breadth,[128] but Story had most of his stu-

126. Seligman, *High Citadel* 41–42 (cited in note 90).

127. See generally Charles R. McManis, "The History of First Century American Legal Education: A Revisionist Perspective," 59 *Wash. U.L.Q.* 597 (1981); Brainerd P. Currie, "The Materials of Law Study," 31 *J. Legal Educ.* 331 (1950).

128. In his inaugural address, Professor Story advised his law students "to addict [themselves] to the study of philosophy, of rhetoric, of history, of human nature." W. Story, ed., *The Miscellaneous Writings of Joseph Story* 529 (Boston, 1852) ("Story, *Writings of Joseph Story*"). Currie, 31 *J. Legal Educ.* at 361–67, observed that the teaching of the Harvard Law School in Story's time was limited to the reading of legal materials and the performance of professional tasks. He accordingly concluded that Story was responsible for the narrowness of Harvard legal education in later decades. It is true, as Currie observed, that the Harvard program was less broad than the teaching being done in Story's time at the University of Maryland or Transylvania University, but in its previous iteration, the Harvard Law School had failed for want of students and the students coming in Story's time seldom stayed for long enough to secure the broad education he described in his inaugural lecture. Story's advice had been

dents for only a year or less. Langdell's three years of rigorous and unrelieved concentration on judicial opinions preempted so much of the energies of students as to preclude most from reading much of anything else for a significant part of their lives.

Similar isolation befell other fields of academic endeavor in the 19th century; Walt Rostow has pointed to a very similar phenomenon that occurred in economics beginning in the same year as Langdell's appointment,[129] an isolation reflected in the work of William Graham Sumner. The American Social Science Association was on its account destined to fragment and dissolve.[130] Isolation was especially unfortunate for professions trained as political elites. Indeed, Langdell's intellectual isolationism threatened to unfit his students for public service, by disabling them from resolving political problems requiring sensitivity to social, economic, and political ramifications.

Another set of possible secondary consequences followed not from Langdell's own reforms at Harvard but from their emulation elsewhere. As almost every law school became a three-year program and adopted rising admissions standards, previously open gates were closed. Jacksonian reforms of the profession were effectively repealed. Some who favored that repeal were outspoken in their desire to make law study a preserve of the privileged class and therefore to deter law study by the children of the urban poor,[131] and it is likely to have had some such effect.[132] In this respect, the Langdell program was distinctly antidemocratic.

Even more clearly, the accumulation of time-serving requirements impeded the entry of African-Americans into the bar. They had only begun to appear in law schools when Langdell arrived on the scene. It was difficult enough for many of them to arrange even one year of higher education, never mind the seven required by the Langdell program.[133] Likewise, the time-serving requirements delayed the arrival of women in the bar, for the larger investment required for entry was a greater disincentive to women expecting to devote some of their careers to children than it was to their male counterparts.[134] In addition, by increasing the size of the investment in foregone income required to become a lawyer, it is likely that the time-

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taken seriously by at least some of his students. Charles Sumner, one of Story's favorite students, made himself a pedant in an effort to maintain Story's favor. See David Donald, *Charles Sumner and the Coming of the Civil War* 22–35 (Cambridge, Mass., 1967).

129. Rostow, *Theories of Economic Growth* 153–55 (cited in note 98). See also Furner, *Advocacy* 278–312 (cited in note 46), and Ross, *Origins* 172–218 (cited in note 53).

130. Thomas L. Haskell, *The Emergence of Professional Social Science: The American Social Science Association and the Nineteenth Century Crisis of Authority* (Urbana, Ill., 1977).

131. Auerbach, *Unequal Justice* 102–29 (cited in note 12); Richard L. Abel, *American Lawyers* 40–73 (New York, 1989) ("Abel, *American Lawyers*").

132. On the contemporary consequences of elevated admission standards, see Carl Auerbach, "Legal Education and Some of Its Discontents," 34 *J. Legal Educ.* 43 (1984).

133. Carrington, *44 Fla. L. Rev.* at 563–67.

134. *Id.*

serving requirements also marginally increased the cost of legal services, making them less available to those most in need.

Perhaps Langdell bears little responsibility for these adverse consequences of his program. He was not an evangelist calling everyone into his revival tent. The primary fault, if fault there be, must lie primarily with the organized bar and those associated with it in the effort to promote the status of the profession by keeping what may have been too narrow a gate.

In addition to these secondary consequences of the programmatic reforms associated with Langdell, there were likely others that were more directly connected to the case method. I postpone comment on those to the concluding Part V of this article.

IV. THREE WISE MEN OF BOSTON

Before that evaluation of the method, I examine the reactions to Langdell's theory and method of three of his contemporaries: Thayer, Gray, and Holmes. Thayer was involved in the propagation of the programmatic reforms to other law schools, but there is otherwise no evidence of his evangelism in these matters. There is none with respect to Gray and apparently none with respect to Holmes, unless an offhand comment can be taken as opposition to the elevation of national standards of professional qualifications.[135]

All three publicly treated Langdell with respect, and they probably shared Holmes' feeling that Langdell was "a noble old swell."[136] But they resisted the notion that the law's essence could be discerned through the application of empirical methodology to judicial opinions, and they did not share his ambition to depoliticize it. They were not smitten with the jurisprudence of John Austin. As New England Anglophiles, they were prone to attribute their thoughts to English sources, but they each pursued law as an avenue to public service; they viewed American law as having a substantial political role and dimension; and they were themselves models of public virtue, mentors suited to the tradition of George Wythe. In these respects, they were departing from the English path and were more faithful than they acknowledged themselves to be to the intentions of late 18th-century America and traditions of antebellum law teaching.

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135. Cf. "Address of Chief Justice Holmes at the Dedication of the Northwestern University Law School Building," Chicago, 20 Oct. 1902, *in* Holmes, *Collected Papers* 272, 277 (cited in note 96): "I almost fear that the intellectual ferment of the better schools may be too potent an attraction to young men and seduce into the profession many who would be better elsewhere."

136. Holmes to Sir Frederick Pollock, 10 April 1881, 1 *Holmes-Pollock Letters* 17 (Boston, 1941).

A. James Bradley Thayer

Thayer was born in 1831 in Haverhill to a family of modest means, but with friends who helped him bear the cost of Harvard College. Graduating in 1852, he taught school for two years before attending Law School. On completing law study in 1856, he practiced law in Boston with two eminent seniors of the bar, Peleg Chandler and George Shattuck.[137] He continued in that association until 1874, acquiring a substantial clientele and achieving a reputation at the bar for both his competence and his integrity. For the last decade of his practice, he also served regularly in the part-time judicial office of Master in Chancery. Perhaps by then he had acquired the status of a "Boston Brahmin."[138]

As early as 1859, Thayer commenced publishing articles on a range of legal and political issues from tariff reform to regulation of corporate franchises. An issue that held his attention over a period of decades was the legal status of Native Americans. On the basis of the literary talent manifested in his writing, he was asked to undertake the 12th edition of Kent's *Commentaries on American Law*, a work completed in association with a junior in his office, Holmes.

In 1874, Thayer joined the Harvard Law faculty. He did not in his teaching or writing seek to extract from judicial opinions "true" legal doctrine; in this sense, he appears never to have adopted Langdell's "scientific" case method.[139] Although Langdell had reservations about the appropriateness of teaching Constitutional Law in a professional law school,[140] Thayer taught that subject as well as Evidence. His students, like those of antebellum teachers, read opinions of the Court, and in due course, he edited a casebook that in two bulky volumes contained virtually every judicial decision interpreting the American Constitution.[141] But he did not in the Langdell manner organize his book so as to suggest a "true," scientific view of the Constitution.

To the contrary, Thayer cautioned the Court (and indirectly the profession) against the substitution of professional or technocratic preferences respecting public issues for those of persons whose elections must be taken to express the will of the sovereign people. He not only cited the Jacksonian Thomas Cooley[142] but assigned to his students the short text published by

137. Shattuck had been a law school classmate of Langdell and had been consulted by Eliot in making the Langdell appointment. LaPiana, *Logic and Experience* 12 (cited in note 44). He was also later a mentor to Holmes.

138. G. Edward White, "Revisiting James Bradley Thayer," 88 *Nw. U.L. Rev.* 48, 60–63 (1993).

139. James Bradley Thayer, "Law and Logic," 14 *Harv. L. Rev.* 139 (1900).

140. Holmes taught Constitutional Law in Harvard College during the first years of Langdell's administration of the law school. 2 Warren, *History* 431 (cited in note 1).

141. *Cases on Constitutional Law* (2 vols., Boston, 1895).

142. This characterization of Cooley will surprise some readers. Because his 1868 work was cited by the Supreme Court in the line of cases leading to its decision in Lochner v. New

Cooley in 1880.[143] His concern for overbearing conduct by the Court appears to have been formed at least partly as a response to the Court's misadventure in *Scott v. Sandford*,[144] to which many of his generation had strenuous objections. He expressed his views in a memorable lecture delivered at the Chicago World's Fair in 1893. The Court, he said, can invalidate legislation only

> when those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question. . . . This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice: that whatever choice is rational is constitutional.[145]

Furthermore, Thayer concluded, it is of paramount importance that the people understand and respect this restraining principle:

> If what I have been saying is true, the safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible mischief that our system leaves open, and must leave open, to the legislatures, and the clear limits of judicial power; so that responsibility may be brought sharply home

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York, 198 U.S. 45 (1905), the conventional view among 20th-century historians has been that Cooley was a social Darwinist or at least a libertarian in contemporary parlance. For a recent expression of that assessment, see Kermit Hall, *The Magic Mirror: Law in American History* 222–23 (New York, 1989). Cooley was, however, a "barnburner"—a radical adherent of Andrew Jackson. As his writings did indeed reflect, he mistrusted legislative regulation of the economy. But, as Jackson's opposition to the Bank of the United States reflected, early populists, of whom Cooley was one, opposed most government intervention in economic matters because they supposed that, in the end, the government's efforts will mostly enrich the wealthy and empower the powerful. He found evidence confirming this view in the performance of the federal government led by Ulysses Grant and his successors. Our own time is not without examples. Cooley strongly favored antitrust laws and public health regulations, and concluded his career as an aggressive regulator of railroads. It is not likely that he would as a judge have voted with the majority in *Lochner*. For further discussion with particular reference to Cooley's views on professional licensing, see Paul D. Carrington, "Legal Education for the People: Populism and Civic Virtue," 43 *Kan. L. Rev.* 1 (1994).

143. Jones, *Constitutional Conservatism* 247 (cited in note 50) (quoting letter of Thayer to Cooley, 24 March 1885).

144. 19 How. 393 (1857). Thomas Grey also points to the legal tender case, Hepburn v. Griswold, 75 U. S. 608 (1868), as a prime example of Thayer's concern. "Thayer's Doctrine: Notes on Its Origin, Scope and Present Implication," 88 *Nw. U.L. Rev.* 28, 32–34 (1993). See also James B. Thayer, "Legal Tender," 1 *Harv. L. Rev.* 73 (1887). Mark Tushnet deconstructs Thayer as an advocate for more effective lobbying by industrialists. "Thayer's Target: Judicial Review or Democracy?" 88 *Nw. U.L. Rev.* 9 (1993).

145. "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harv. L. Rev.* 129, 144 (1893).

> where it belongs. The checking and cutting down of legislative power by numerous detailed provisions in the constitution cannot be accomplished without making the government petty and incompetent. . . . Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere. . . .[146]

In using diction fashioned as a standard for the review of jury verdicts, Thayer likely overstated the conventional wisdom of the Revolutionary generation regarding the scope of judicial power and responsibility.[147] The "elsewhere" of which he spoke was the moral self-discipline of the electorate to which the Revolutionaries expected the legal profession to contribute.

For almost a quarter-century, Thayer devoted his primary effort to writing a book on the law of Evidence.[148] Such a book was published in 1898, near the end of his career, and provided an intellectual framework on which was built the great treatise later written by his student, John Henry Wigmore.[149] The strength of his book is in its historical treatment of trial by jury, an institution that Thayer recognized as political in its origins and effect. It seems unlikely that a student learning Evidence from the author of that work could have failed to perceive that body of law as one laden with political values and assumptions almost as rich as those with which Constitutional Law is suffused.

Moreover, Thayer, unlike Langdell, was throughout his academic career involved in the public issues of his time. His concern for Native Americans continued and he was deeply troubled by the conditions in which "Reservation Indians" lived. He lobbied Congress to make law protecting individual Indians from the chaos that ruled many of the recently established reservations in the late decades of the 19th century.[150] In 1898, he publicly and vigorously opposed the War with Spain, the first venture of the American military force on the world stage. Ostensibly, that war was a response to insults, but in truth it was an imperial adventure. Thayer argued that such ventures threatened civil government in America by weakening the civic virtues essential to sustain democratic traditions, that a republic cannot be an empire. When the brief war was won, Thayer expressed his regret:

> No longer can we claim our old good fortune of being able to work out a destiny for ourselves, here in the western world. In my judgment,

146. *Id.* at 156.

147. For presentation of many view of this essay, see Symposium, "One Hundred Years of Judicial Review: The Thayer Centennial Symposium," 88 *Nw. U.L. Rev.* 1 (1993).

148. *A Preliminary Treatise on Evidence at Common Law* (Boston, 1898). This work was in some measure derivative from the earlier work of Simon Greenleaf's, a contemporary and Harvard Law colleague of Joseph Story. See his *Treatise on the Law of Evidence* (1st ed. 1842).

149. *Treatise on Evidence* (4 vols., Boston, 1904–5). On the relationship between Thayer and Wigmore, see William Twining, *Theories of Evidence* 5–9 (Stanford, Cal., 1985).

150. "A People without Law," 68 *Atlantic Monthly* 683 (1891).

> it was a bad mistake to throw away our wonderful inherited felicity, in being removed from endless complications with the politics of other continents. Had we appreciated our great opportunity and been worthy of it, we might have worked out here that separate, peculiar, high destiny which our ancestors seemed to foresee for us, and which with all its grave drawbacks and moral dangers, might have done more for mankind than anything we may hope to accomplish now by taking a leading part in the politics of the world. "Let not England," said John Milton to Parliament in 1645, "forget her precedence of teaching nations how to live." So to the United States of America, before this Spanish war—possessed as she was of this fortunate isolation, of free yet guarded institutions, of vast, unpeopled areas, of an opportunity to illustrate how nations may be governed without wars and without waste, and how the great mass of men's earnings may be applied, not to the machinery of government, or the rewarding of office-holders, or the wasteful activities and enginery of war but to the comforts and charities of life and to all nobler ends of human existence,—so I say, to our country as she was before the war that solemn warning of Milton, "God-gifted organ-voice of England," might well have come: "Let not America forget her precedence of teaching nations how to live."[151]

Is it not to be inferred that the author of these words saw himself as a teacher of public law engaged in the traditional role of sharing with his students a moral duty to remind America of the sacrifices required to maintain a republic?

Thayer was active in the American Bar Association and was an early chairman of its Section on Legal Education. This afforded him an opportunity to share with the bar his view of the aims of university legal education. Although in manifestation of his New England Anglophilia, he attributed his views to the English tradition established by William Blackstone,[152] and although he spoke partly in defense of the debatable Langdell programmatic reforms, his more optimistic words and aims were far closer to the thoughts of Jefferson than to any expressed by Blackstone or by Langdell:

> If then we of the American Bar would have our law hold its fit place among the great objects of human study and contemplation; if we would breed lawyers well grounded in what is fundamental in its learning and its principles, competent to handle it with the courage that springs from assured knowledge, and inspired with love of it,—men who are not, indeed, in any degree insensible to worldly ambitions and emoluments, who are, rather, filled with a wholesome desire for them, but whose minds have been lifted and steadied and their ambitions

151. "Our New Possessions," 12 *Harv. L. Rev.* 464, 465–66 (1899). Compare Simeon E. Baldwin, "The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory," 12 *Harv. L. Rev.* 393 (1899), and Langdell, 12 *Harv. L. Rev.* (cited in note 113).

152. "The Teaching of English Law at Universities," 9 *Harv. L. Rev.* 169, 171 (1894).

> purged and animated by a knowledge of the great past of their profession, of the secular processes and struggles by which it has been, is now, and ever will be struggling toward justice and emerging into a better conformity to the actual wants of mankind—then we must deal with it at our universities . . . as all other sciences and all other great and difficult subjects are dealt with, as thoroughly, and with no less expenditure of time and money and effort.[153]

We hear the glancing reference to law as science, but we can scarcely fail also to receive a message that was squarely in the American law teaching tradition. Thayer was preparing his students for public responsibility in a republic. In employing the case method, he was therefore not with Langdell training students to be pseudo-scientists.

Because of his active work in the profession, Thayer was much better known and more widely respected among the small profession of law teachers than any of his Harvard colleagues. He was by acclamation selected as the first President of the Association of American Law Schools when it was founded in 1900. If those who elected him also followed his leadership with respect to the aims and methods of their teaching, few of them were in any useful sense "Langdellians."

B. John Chipman Gray

Gray was born in 1839 in Brighton, across the Charles River from Cambridge. He graduated from Harvard College in 1860 and attended the Harvard Law School. He was admitted to the bar in September 1862 and promptly enlisted for three years as a lieutenant in the Massachusetts 41st Regiment. His reasons for enlisting were unstated; his son recorded that "he was never an abolitionist," but "an uncompromising Union man and believed in prosecuting the war with vigor."[154] Perhaps another of his reasons was revealed when, years later, he opposed veterans' bonuses, contending that military service was a duty owed by reason of the rights conferred on soldiers as citizens, a duty that all had therefore been adequately rewarded for performing.[155]

Gray served as an officer with the Army of the Potomac in northern and eastern Virginia, with a division assigned to duty on the islands offshore in South Carolina where they engaged in artillery duels with Confederate fortifications, and finally with the Army of General Sherman. He was a notably unself-conscious man. It was said to be characteristic of him that

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153. *Id.* at 184.

154. Roland Gray, *John Chipman Gray* 7 (Boston, 1917) ("R. Gray, *Gray*").

155. Compare the teaching of Lieber on the relation of rights to duties. Carrington, 42 *J. Legal Educ.* (cited in note 34).

the only public office he ever performed was very dangerous, and he never spoke of that. Holmes also thought it characteristic that General Sherman had been favorably impressed with Gray on first meeting but was not told his name.[156] Thayer seems to have expressed a widely shared assessment of Gray as "a rock of trust."[157]

After the war, Gray practiced in Boston, acquiring a close friendship with Holmes that would abide for a half century. Manifesting his scholarly bent, he founded the *American Law Review* in 1866 and, while engaged in a successful practice, served as its editor for four volumes. In 1873, he became a part-time member of the Harvard law faculty, and two years later was appointed to the newly established Story Professorship.

As a lawyer, Gray had earned a reputation described by Holmes as "a very wise man. So wise that those who met him in affairs perhaps would say that wisdom was the first thing to be mentioned with his name."[158] It may have been Gray's and Thayer's standing in the profession that enabled Langdell's reforms to stand. According to Samuel Williston, Gray's reputation for sound judgment was such that many lawyers supposed that "if he thought [Langdell's work] good, there must be some good in it."[159] Privately, however, Gray was contemptuous of Langdell's theory.[160]

Gray was said to be a natural teacher who treated his students as equals engaged in a common venture "to get at the truth."[161] He was not quick to embrace the case method in his own teaching, although he assigned many judicial opinions as reading to be completed as preparation for his lectures. He was admired as a lecturer who exhibited a very high level of oral composition. He did not share Langdell's zeal to depoliticize law; although teaching private law, his teaching and scholarship was not politically antiseptic.[162] As the years passed, he increasingly engaged his students in classroom discourse about the cases they had read, and in due course he edited an elephantine casebook in Property.[163]

Gray followed Story's path in writing treatises that he hoped would influence the development of the law in socially useful ways. His writings

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156. Address *in* R. Gray, *Gray* 50.

157. *Quoted in id.*. at 138.

158. *Quoted in id.* at 49.

159. Remarks, *in id.* at 115.

160. Gray wrote Eliot that Langdell's "intellectual arrogance and contempt is astonishing" and his detachment from reality a cause for despair about the future of the school. Letter of 8 Jan. 1883, *quoted in* Mark DeWolfe Howe, *Justice Oliver Wendell Holmes: The Proving Years* 158 (Cambridge, Mass., 1963) ("Howe, *Holmes: The Proving Years*"). See also LaPiana, *Logic and Experience* 18–20 (cited in note 44).

161. Ezra Ripley Thayer, "John Chipman Gray," 28 *Harv. L. Rev.* 539, 543 (1915).

162. In the preface to his first major work, *The Rule against Perpetuities* v (Boston, 1886) ("Gray, *The Rule*"), he explained: "In no part of the law is the reasoning so mathematical in its character; none has so small a human element. A degree of dogmatism, therefore, may be permitted here which would be unbecoming in other branches of the law."

163. *Select Cases and Other Authorities on the Law of Property* (4 vols.; Cambridge, Mass., 1888–90).

were intended, as he phrased it, "to remove defects in the law that lessen its value as a guide to conduct."[164] His books on *Restraints on Alienation* and on *The Rule against Perpetuities* grappled with complex problems of private law that had substantial consequences for the social and economic order, and he did not blind himself or his readers to those consequences.[165] Because so many later observers have been so prone to presume that Langdell colleagues were infected with the Dean's pseudo-scientific theory, it is worth a page or two to examine Gray's scholarship on the law of property.

Gray's readers can detect almost at once that his cultural ties are to the mercantile class of Boston. He proceeded from a Puritan New England premise that one ought to pay one's debts. He therefore opposed "spendthrift trusts"—gifts of property that the creditors of the beneficiary may not take to satisfy obligations owing to them. Such restraints on alienation were disallowed by English and American courts until the late 19th century. In 1883, Gray observed such restricted gifts to be a symptom of society's movement away from individual rights and freedom of contract toward rights measured according to one's status, where individuals are protected from their own improvidence:

> If we are all to be cared for, and have our wants supplied without regard to our mental and moral failings in the socialist Utopia, there is little reason why in the meantime, while waiting for that day, a father should not do for his son what the State is then to do for all.[166]

Paternalism he identified as the essence of both socialism and spendthrift trusts.

However, before concluding that Gray's politics were hopelessly class-bound, one ought note his reflection:

> The statutes of New York, as interpreted by the courts, provide that the surplus of income given in trust beyond what is necessary for the education and support of the beneficiary shall be liable for his debts. The education and support to which any and every person is entitled at common law is an education at the public schools and a support as a pauper, and his father's history and his own history is of no consequence, but now, under the New York statutes so interpreted, all this is changed. The court takes into account that the debtor is "a gentleman of high social standing, whose associations are chiefly with men of leisure, and who is connected with a number of clubs," and that his income is not more than sufficient to maintain his position according to his education, habits, and associations.

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164. Gray, *The Rule* iii.

165. Robert S. Summers lists him as the first "instrumentalist." *Instrumentalism and American Legal Theory* 23 (Ithaca, N.Y., 1982). But see Gregory S. Alexander, "The Dead Hand and the Law of Trusts in the Nineteenth Century," 37 *Stan. L. Rev.* 1189 (1985).

166. *Restraints on the Alienation of Property* ix (Boston, 1895).

> To say that whatever money is given to a man cannot be taken by his creditors is bad enough; at any rate, however, it is law for rich and poor alike; but to say that from a sum which creditors can reach one man who has lived simply and plainly can deduct but a small sum, while a large sum may be deducted by another man because he is of "high social standing," or because his "associations are with men of leisure," or because he "is connected with a number of clubs" is to descend to a depth of shameless snobbishness as any into which the justice of a country was ever plunged.[167]

Stringent as was his view of the law of New York, Gray's professional discipline was maintained. He struggled, and presumably led his students to struggle, against inculturated prejudices dissonant with the evolving public mores and aspirations:

> On the one hand, no humane man can feel that the industrial and commercial prosperity which flourished under the old system was the highest ideal for a community, and on the other hand no prudent man but must dread lest the amiable altruistic sentiment, today so fashionable, dash itself to pieces against the inexorable facts of nature, and our latter end be worse than the beginning. . . . I am no prophet, and certainly do not mean to deny that [spendthrift trusts] may be in entire harmony with the social code of the next century. Dirt is only matter out of place; and what is a blot on the escutcheon of the common law may be a jewel in the crown of the social republic.[168]

Gray's books on Property were written for an audience of lawyers and judges. What may seem a heavy commitment to relatively narrow and technocratic subjects was the product of his ambition to be very thorough in whatever he wrote, an ambition he amply fulfilled. Moreover, strong as his views were, he was doggedly honest in reporting decisions and reasons with which he disagreed.

In 1905, Gray delivered a series of lectures at Columbia that were published as *The Nature and Sources of Law*. These were in large measure a caution against abstract legal theory that can be read as a complete disavowal of Langdell's metaphysical approach to law. He commenced:

> Most of us hold in our minds a lot of propositions and distinctions which are in fact identical, or absurd, or idle, and which we believe, or pretend to ourselves to believe, and which we impart to others, as true and viable.[169]

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167. *Id.* at xi.

168. *Id.* at x.

169. R. Gray, ed., *The Nature and Sources of Law* 2 (2d ed. Boston, 1921). The first edition was published in 1909 ("Gray, *Nature and Sources*").

To this warning, however, he addressed a more specific precaution that reflects his attraction to the case method:

> The danger in dealing with abstract conceptions, whether in Law or in any other department of human knowledge, is that of losing foothold on the actual earth. The best guard against this is the concrete instance, the example.[170]

Faithful to his own prescription, his book is never distant from the concrete instance.

Gray then proclaimed that law is "composed of the rules which the courts lay down for the determination of legal rights and duties." He scorned the dictum of Blackstone and many others that judges merely discover the law, the law having some mystic existence independent of judicial utterances and merely making itself known only through those oracles. Insisting that judges do indeed make law, he repeatedly quoted an 18th century English bishop: "Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them."[171]

This "pre-Langdellian"[172] and equally "postmodern" vision of lawmaking did not directly conflict with Langdell's approach, which equally emphasized the interpretive role of judges. But Gray then goes on to identify the range of sources that may properly influence courts in making law, and in this his vision was notably broader than Langdell's, and entailed an explicit rejection of the legal theory of John Austin.[173]

Gray was too realistic to question the influence of individual judges on the composition of the law. But, he urged, law is not merely "the opinions of half a dozen old gentlemen, some of them, conceivably, of very limited intelligence." Those men

> seek the rules that they follow not in their own whims, but they derive them from sources often of the most general and permanent character, to which they are directed, by the organized body to which they belong, to apply themselves.[174]

He thus staunchly affirmed the duty of courts to obey their sovereigns, for judges are "but organs of the state."[175] And the state by contriving appellate

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170. *Id.* at 4.

171. *Id.* at 125.

172. This is the characterization given Gray in William Twining, *Karl Llewelyn and the Realist Movement* 22 (London, 1973) ("Twining, *Llewelyn*").

173. Gray, *Nature and Sources* 222–32.

174. *Id.* at 85.

175. *Id.* at 121.

courts and by means of moral suasion compels the substantial measure of obedience that provide judge-made law with its effect.

The most immediate commands of the American sovereign (the people) to their judges, Gray noted, are statutes and precedents, which must be interpreted and construed. He therefore proceeded in brief compass to cover much the same ground as Francis Lieber's *Legal and Political Hermeneutics*,[176] and a portion of Thomas Cooley's *Constitutional Limitations*.[177] He concluded that legislative intent is either obvious from the text or probably does not exist; the interpreter must therefore consider the purpose of the text as it appears from a consideration of the whole and of the practical consequences resulting from the attribution of one meaning rather than another.

Gray observed that the decisions of the courts of one state were properly no more influential in other states than equally learned nonjudicial opinions.[178] By the same token, he concluded that federal courts hold no commission to make state law. Justice Story's celebrated decision in *Swift v. Tyson*[179] was therefore wrong:

> Among the causes which led to the decision in *Swift v. Tyson*, the chief seems to have been the character of Judge Story. He was by far the oldest judge in commission on the bench; he was a man of great learning, and of reputation for learning greater even than the learning itself; he was occupied at the time in writing a book on bills of exchange, which would of itself lead him to dogmatize on the subject; . . . he was very fond of glittering generalities; and he was possessed by a restless vanity. All these things conspired to produce the result.[180]

These faults led Story to deny the force of precedent and the authority of highest state courts to develop their own legal doctrines and caused him to arrogate to the Supreme Court a role that it was not commissioned to perform. Gray's views were embraced by Justices Holmes and Brandeis and in due course formed the basis for the opinion of the Court in *Erie R.R. v. Tompkins*.[181] His criticism of *Swift* necessarily if not explicitly rejected Langdell's loose treatment of precedent and his reader-centered conception of the entitlements of those who read opinions to reconstruct their significance to fit the abstract theory residing in the mind of the reader.

Gray's sources of law other than statutes and precedents included custom, the expectations of the legal profession, the opinions of experts, morality, and equity, but not public opinion, which could be presumed to be

176. Lieber, *Hermeneutics* (cited in note 34).
177. Cooley, *Limitations* 38–84, 159–88 (cited in note 51).
178. Gray, *Nature and Sources* 243 (cited in note 169).
179. 91 U. S. 216 (1842).
180. Gray, *Nature and Sources* 253.
181. 304 U. S. 64 (1938). Holmes was not alive to participate in the decision.

uninformed and transient.[182] In treating law and legal institutions as cultural artifacts, he identified himself with the general pattern of thought sometimes described as "historical jurisprudence," an appellation often associated with the earlier work of Friedrich Carl von Savigny. Others associated with this "school" include most 19th century American law teachers, but especially Lieber and Cooley.[183]

Although all judges might be equally informed by these sources, they could be expected to differ in many close cases according to the personal traits and values each must bring to the work. Thus, two adjoining states having an identical law can reasonably be expected to interpret it differently in its application to some cases, and can be expected to interpret and apply precedents from other states variously; such differences will seldom reflect deep differences in the cultures, customs, or moralities of those states, but are more likely to reflect the personal traits or politics of the judges making different laws from common sources. Gray therefore affirmed that individual judges do make a difference:

> It is contended that the Zeitgeist, or the great underlying forces and instincts of human nature will have their way without regard to, and in spite of, the acts of individuals; that such acts are but ripples upon the mighty stream of time. . . . It may be that the ultimate goal of human experience will be the same as if Caesar or Napoleon or Mahomet had never existed. That may be true of the ultimate goal; but the road by which humanity, through long periods of its history, will travel toward its goal is largely determined by the beliefs, the opinions, the acts, of great men.
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> And not of great men alone; [a] very small [man] may produce great results . . . if he happens to be put in a great place. I know of no reason to suppose that Montagu, C.J. and Chamberlayne and Houghton, JJ, were in any way great men, but the fact that they said one thing rather than another has seriously affected the course of human affairs in an important department of the law.[184]

So much for law as empirical science!

There is but little evidence that Gray's own scholarship "seriously affected the course of human affairs in an important department of the law." His advocacy against spendthrift trusts was not successful. Possibly his work

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182. Gray, *Nature and Sources* 287–90.

183. In some measure, this applies even to Dwight, although to Dwight, history revealed stable, perhaps permanent, principles. See *Inaugural Addresses of Theodore W. Dwight and George P. Marsh in Columbia College* 38–40 (1859). And see Gilmore, *American Law* 34–60 (cited in note 5).

"Historical jurisprudence" is a view that abides. E.g., Robert Clark, "The Interdisciplinary Study of Legal Education," 90 *Yale L.J.* 1238 (1981); Stephen B. Young, "Beyond Bork: Historical Jurisprudence in Replacement of the Enlightenment Project," 35 *J. Legal Educ.* 333 (1985). Compare Carrington, 41 *Duke L.J.* (cited in note 60).

184. Gray, *Nature and Sources* 239–40.

on the rule against perpetuities had some effects; it was widely cited.[185] Whether his jurisprudence had consequences one cannot say.

Perhaps more enduringly significant was Gray's teaching. While he was slow in coming to the case method, he became an exponent. It was he who was challenged to defend it in the first volume of the Yale Law Journal and he did. Always prudent, he was careful to disown (but not by name) the scientific theory, and warned its enthusiasts that they were "sailing perilously close to the shoals of cant."[186]

Gray's casebook in Property reflected this intellectual modesty and discipline. The book did not forsake the possibility of inductive reasoning from groups of cases but seems not to manipulate the reader's inductions in quite the way that Langdell's casebook strove to do. The cases were of current interest and afforded the teacher and student opportunities to consider the sources identified in his Columbia lectures and to conduct the discreet and practical analyses exemplified in his scholarship. More importantly, Gray's casebook, like Thayer's later work, included secondary materials selected for their illumination of the most difficult problems—students were not left wholly alone in the dark.[187] In these respects, his teaching, like Thayer's, was a substantial departure from Langdell's. And as a teacher he seems to have had a powerful effect on at least some students, notable examples being Roscoe Pound[188] and Felix Frankfurter.[189] Harvard's appointment of Pound in 1910 was a moment of triumph for Gray over his deceased colleagues, Langdell and Ames.

C. Oliver Wendell Holmes, Jr.

Holmes was born in 1841 and raised on Beacon Hill amongst the intellectual elite of the city. Like Gray and Thayer, but unlike Langdell, he strenuously involved himself in the events of his time.

As a youth, he witnessed the forced return of fugitive slaves, and followed Emerson and others of his father's friends in supporting the abolition-

185. On the distinction between citation and influence, see Carrington, 41 *Duke L.J.* 800–801 (cited in note 60).

186. "Methods of Legal Education," 1 *Yale L.J.* 159, 161 (1891).

187. This feature of the Gray book became almost universal. See Albert James Harno, *Legal Education in the United States* 69 (Chicago, 1953).

188. Pound's debt to Gray is discussed in Sutherland, *Law at Harvard* 201–4 (cited in note 2). Pound was like Gray influenced by Savigny; his "sociological jurisprudence" was but a step beyond "historical jurisprudence." See David Wigdor, *Roscoe Pound, Philosopher of Law* 161–232 (Westport, Conn., 1974).

189. Frankfurter was also close to Thayer and a powerful influence on his successors at Harvard. Frankfurter reacted against the emphasis on private law, and sought to bring the Harvard Law School back to the traditional aim of American law teachers, training a democratic elite. See Michael E. Parrish, *Felix Frankfurter and His Times: The Reform Years* (New York, 1982); Sanford Levinson, "The Democratic Faith of Felix Frankfurter," 25 *Stan. L. Rev.* 430 (1973).

ists. Graduating from Harvard in 1861 as the class poet,[190] he promptly volunteered for three years of military service as an officer in the Massachusetts 20th Regiment. His motives for being an early volunteer were not only his hostility to slavery and his hope for saving the union but also his belief that "a man should share the passion and action of his time at peril of being judged not to have lived."[191]

In October 1861, he was shot in the chest at Ball's Bluff (just south of the Potomac) but made an improbable recovery. He returned to his unit in the spring of 1862, served in the Peninsula campaign that summer, and in October was shot in the neck at Antietam on what was then the bloodiest day of war ever recorded. Again he made an improbable recovery and again he returned to his unit. At Fredericksburg in May 1863, he was shot a third time; this wound was in the foot and less serious, but put him on crutches for some time, causing him to miss the Battle of Gettysburg. He returned to his unit, but his fighting spirit had flagged, and was at last extinguished when his closest military comrade was killed at The Wilderness. He mustered out of the Army in 1864, just as the Confederate Army of Northern Virginia had begun to break.[192]

The sustained exposure to the risk of violent death and mutilation and his experience in killing other men in close combat had its inevitable effects on Holmes.[193] Although he seems to have suffered from serious combat fatigue in 1864, in later years, he was prone to romanticize the military experience even while he was starkly realistic if not cynical about almost everything else. The war may also have been the source of his tendency to see force or the threat of force as the paramount means of resolving conflict. Another apparent consequence was his enduring distaste for self-righteous reformers, such as the abolitionists whom he had earlier supported, or the prohibitionists whom he encountered late in life: "When you know that you know, persecution comes easy,"[194] he affirmed.

Whether because of his wartime experience or his Puritan origins or for other reasons, Holmes embraced a view of the world more dour than that of

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190. His academic standing was undistinguished, but Harvard marks in his time were substantially based on deportment. For discussion, see G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* 25–27 (New York, 1993) ("White, *Holmes*").

191. *Quoted in* Liva Baker, *The Justice from Beacon Hill* 97 (New York, 1991) ("Baker, *The Justice*").

192. For a full account of Holmes's military experience, see Sheldon Novick, *The Life of Oliver Wendell Holmes* 29–89 (Boston, 1989).

193. It may be overstatement to say that "[t]he lesson Holmes seems to have derived from his Civil War experience is that all passionate appeals to conscience and morality resulted in the destruction of a fragile social order." Horwitz, *Transformation* 116 (cited in note 99). Holmes was not wrong in believing that the abolitionists he knew as a youth were so overwrought by their disgust with slavery that they were irrational in favoring a program, viz., disunion, that would have done nothing to relieve the misery of the slaves.

194. Letter to Frederick Pollock, 30 Aug. 1929, quoted in Posner, *Essential Holmes* 108–9 (cited in note 97).

most 18th century American Revolutionaries, even such fellow Puritans as John Adams, in its distrust of humanity and its capacity for self-improvement. He later complained of the many authors who "make me wonder whether I live on a lower plane than is attainable by man, or whether, of course, as I maintain, they are churning the void in the hope of making cheese."[195] In the same vein, he echoed traditional New England Puritan skepticism regarding the possibility of public virtue in democratic government:

> [I]n the last resort a man rightly prefers his own interest to that of his neighbors. And this is as true in legislation as in any other forms of corporate action. All that can be expected from modern improvements is that legislation should easily and quickly, yet not too quickly, modify itself in accordance with the will of the de facto supreme power in the community, and that the spread of an educated sympathy should reduce the sacrifice of minorities to a minimum. But whatever body may possess the supreme power for the moment is certain to have interests inconsistent with others who have competed unsuccessfully.[196]

Holmes's pessimism about humanity in general did not extend to the numerous individuals whom he admired and enjoyed, nor most especially to himself, for he returned from war a "powerful battery, formed like a planing machine to gouge a deep self-beneficial groove through life."[197] Driven to surpass a famous father, Holmes enrolled in the law school to pursue a discipline that his father had found "cold and cheerless."[198] While at first he found law to be a "ragbag of details," he soon found that the material went "down like macaroni. You give a little suck and pwip! you've swallowed it and never known it."[199]

In 1866, Holmes became a neophyte in the law office of Chandler, Shattuck and Thayer. He did not warm to the practice of law and devoted himself chiefly to scholarship, much in the pattern of Thayer. In 1870, he became a co-editor of the journal founded by Gray. The edition of Kent's *Commentaries* completed under Thayer's auspices was forthcoming in 1873; when it appeared, both Thayer and Kent's grandson were greatly annoyed to find that only the name of Holmes appeared on the title page.[200] Doubtless the contribution that Holmes had made to the merit of the edition was very great, but his presumption in promoting himself at the expense of his mentor reveals the intensity of his drive.[201] It was at about this time that he

195. Letter to Harold Laski, 20 Aug. 1909, *quoted in id.* at 116.
196. "The Gas Stokers' Strike," 7 *Am. L. Rev.* 582, 583 (1873).
197. William James, *quoted in* Baker, *The Justice* 268.
198. 1 John Torrey Morse, *Life and Letters of Oliver Wendell Holmes* 63 (Boston, 1896).
199. *Quoted in* Baker, *The Justice* 176.
200. *Commentaries on American Law* (12th ed. Boston, 1873).
201. For a full account of this event, see White, *Holmes* 124–27 (cited in note 190).

formed the ambition to become a Justice of the United States Supreme Court.

In 1870, Holmes was employed to teach Constitutional Law in Harvard College, an activity that he could pursue while editing, writing essays, and maintaining a modest practice, sometimes in partnership with his younger brother, Ned. In 1872, his teaching was removed to the Law School, where he gave 18 lectures on Jurisprudence to Langdell's students.[202] These lectures seem not to have been preserved, but it can reasonably be supposed that Holmes trimmed his thoughts to fit the environment in which they were uttered, for his view of Langdell's new program was acid. He reviled the claim that the case method is science, comparing Langdell to a biology teacher "who would give one of his pupils a sea urchin and tell him to find all about it he could." He condemned Langdell's casebook on Contracts as a "misspent piece of marvellous ingenuity" that served the "powers of darkness"[203] and dismissed him as a "legal theologian."[204] In his view, Langdell, although an otherwise admirable person, lacked good sense.[205]

In 1873, Holmes returned to full-time law practice with George Shattuck but continued to devote his evenings to scholarship. For almost a decade, he labored day and night. During the day, he acquired much valuable experience. The product of his evenings was a series of lectures based upon his earlier essays and published in 1881 as *The Common Law*. This was an intellectually ambitious work. Its main theme was captured in the elegant introductory aphorism proclaiming experience, not logic, to be the life of the law.[206] Although it has never been entirely clear what Holmes meant by this, he clearly affirmed that legal principles articulated by English judges were not, as they were presented, of divine origin, or even the product of an inexorable historic force, but were the utterances of practical men striving to justify their applications of force to resolve disputes by reference to the predictable social consequences of the rules they expressed. Law is thus the product of an historical process. This theme was elaborated with impressive—if often abstruse—scholarship tracing the circumstances in which common law doctrines emerged.

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202. Baker, *The Justice* 208 (cited in note 191).

203. *Quoted in id.* at 208–9. Holmes's published review of Langdell was less harsh. Book Notice, 6 *Am. L. Rev.* 354 (1872) and Book Notices, 14 *Am. L. Rev.* 14 (1880). The latter, a review of the second edition, was unsigned. For attribution of authorship, see Saul Touster, "Holmes a Hundred Years Ago: The Common Law and Legal Theory," 10 *Hofstra L. Rev.* 673, 695 n. 91 (1982).

204. Book Note, 14 *Am. L. Rev.* 233 (1880).

205. See generally on Holmes's view of Langdell, Howe, *Holmes: The Proving Years* 155–59 (cited in note 160).

206. Holmes, *The Common Law*, ed. Mark DeW. Howe, at 32 (Boston, 1963) ("Holmes, *The Common Law*").

A secondary theme woven through the fabric of Holmes's book is that judge-made law is organic, undergoing perpetual change as judges relate its texts to the life being experienced around them:

> [T]he law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.[207]

Unfortunately, the force of this observation was often blunted by the author's tendency to make didactic statements of the law in terms seeming to portray unchanging and perhaps unchangeable dogma. He revealed a propensity to use history in the service of policy arguments, causing Albert Dicey to compare Holmes himself to theologians.[208] Edward White accurately describes Holmes's method as equally "breathtaking" and "presentist" as that of Langdell.[209]

Holmes's book successfully refuted William Blackstone with respect to the divine immutability of judge-made private law. But his work was less novel than it seemed to many at the time. It did contrast with the more formal approach to law embodied in English judicial opinions and in the legal theory of John Austin.[210] It also contrasted with some American judicial opinions.[211] Perhaps the appearance of novelty was also in part the result of Holmes's disinclination to cite sources for his ideas,[212] a tendency perhaps related to his quickness to resentment when a judge "used his notion with no credit given."[213] His initial aphorism about the greater importance of experience was almost a quote from Joseph Story's uncited inaugural lecture.[214] The thesis that law is a product of a historical process had been fully developed by Savigny, and by many American authors, per-

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207. *Id.*

208. Dicey's review appeared in *The Spectator* for June 3, 1882; for discussion see White, *Holmes* 185.

209. White, *Holmes* 171.

210. In one important respect, Holmes was Austinian. This was in the stern distinction he made between law and morality. See generally his "The Path of the Law," 10 *Harv. L. Rev.* 457 (1897).

211. The "Grand Style" of American judicial opinions appeared at the outset. For explanation, see Carrington, 41 *Duke L.J.* 753–55 (cited in note 60). Slavery litigation contributed to a revival of English formalism in the middle of the 19th century. William E. Nelson, "The Impact of the Anti-Slavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America," 87 *Harv. L. Rev.* 513 (1974).

212. White, *Holmes* 152 (cited in note 190), notes that Holmes's inadequate citations had the effect of making him appear to be "virtually alone" in his views.

213. William Roalfe, *John Henry Wigmore: Scholar and Reformer* 78 (Evanston, Ill., 1977) ("Roalfe, *Wigmore*").

214. Story, *Writings of Joseph Story* (cited in note 128).

haps most notably Francis Lieber. But especially in his last essay on legal education,[215] Holmes presented his thesis as original thought.

Moreover, the refutation of Blackstone was hardly news. Indeed, it is not wholly clear that even Blackstone himself when proclaiming judicial rhetoric to descend from a mystic origin was doing more than engaging in a harmless romanticization designed to promote public toleration of the judiciary. Blackstone knew who made English law, and was not ignorant of their motives. Certainly English observers such as Blackstone's student, Jeremy Bentham, and John Austin had seen through the camouflage of sanctimony. So surely did 18th century Americans, who had never been in doubt about where their most fundamental law, the Constitution, had come from. Or when. Or why. It is therefore unlikely that many of the antebellum law teachers, preoccupied as they were with Constitutional Law, often lapsed into the delusion that American law was other than the embodiment of the practical moral judgment and experience of the men who expressed and enforced it. St. George Tucker, Blackstone's most important American editor,[216] was not deceived to think that he was editing holy writ. And while politically conservative authors such as James Kent often treated English private law with a degree of reverence, it is impossible that even Kent could have long deceived himself about the social and political sources of American law. He was after all himself a practical judge who had adapted English property law to the realities of American life, and one who had exercised the power to invalidate New York legislation. Thus, except for shallow readers of Blackstone, the message of Holmes's work was not really news. Holmes was in no sense more approving of judicial use of sound moral judgment than Jefferson or Timothy Walker or the Transylvanians, or even Joseph Story, who greatly admired the innovative Lord Mansfield.[217] And much the same account of "judicial legislation" was provided in *Cooley on Torts*,[218] a treatise published two years before Holmes's work, but not cited by him.

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215. 10 *Harv. L. Rev.* This was a lecture presented at Boston University in 1897. Horwitz, *Transformation* 142 (cited in note 99), identifies this lecture as the moment from which Langdell's theory of apolitical law "was brought constantly under attack." This may reflect a somewhat ethnocentric view; I am not certain that Langdell's theory was ever taken seriously enough west of the Hudson River to warrant an attack.

216. St. George Tucker succeeded George Wythe as Professor of Law and Police at the College of William and Mary in 1790. His Americanized version of Blackstone's *Commentaries* was published in four volumes at Philadelphia in 1803.

217. Among those who have celebrated Holmes's work as an intellectual breakthrough was Felix Frankfurter. Kalman, *Legal Realism* 55–56 (cited in note 92). Frankfurter was perhaps justly accused of "institutional parochialism" requiring him to celebrate everyone associated with the Harvard Law School. Nevertheless, he was not wrong to see in Holmes almost everything that was later said by Frank, Llewellyn, and Douglas. Where perhaps he erred was in failing to trace those ideas beyond Holmes into earlier antecedents.

218. Cooley, *Torts* 11–12 (cited in note 111).

That Holmes' work pretended to greater novelty than it provided is not to deny his achievement. It is perhaps often a characteristic of admirable literature that it gives candid expression to ideas owned by, but not quite fully formed in the minds of, many others. While *The Common Law* was often turgid, so turgid that few readers will ever again complete its reading, it was also sometimes exceptionally lucid in style, and it served to confirm both that the common law as well as the Constitution is man-made, and is self-modifying through an organic process. For these reasons, it was widely celebrated as an important book. Justice Benjamin Cardozo, himself no slouch at turning a pregnant phrase, unstintingly extolled Holmes' introductory aphorism: "Here is the text to be unfolded. All that is to come will be development and commentary."[219] Almost perversely, Holmes' book was taken by many as the sound justification for Langdell's case method that its author had been unable to provide with his unconvincing explanation of legal empiricism.

In 1882, in response to the acclaim for his book, Holmes was appointed to a professorship in the Harvard Law School, a chair having been endowed with funds raised by his former mentor, Thayer.[220] During the short time that he taught, he became a devotee of the case method.[221] However, a few months after entering into service as a professor, he resigned to accept an appointment to the Supreme Judicial Court of Massachusetts, a rejection that Thayer found it difficult ever to forgive.[222] Reasons for his departure were his assessments that he had already conclusively expressed his philosophy of law and that "Academic life is but half life . . . withdrawal from the fight in order to utter smart things that cost you nothing except thinking them from a cloister."[223]

For the half-century that Holmes was a judge, he acknowledged and strove to perform his duty to "be superior to class prejudices and to his own prejudices."[224] Within the Supreme Court of the United States, he was an advocate of institutional self-restraint, a defender of the prerogatives of state legislatures, and thus incidentally an exponent of the ideas of Thayer. His esteem for precedent was not so great as to prevent him from opposing adherence to Justice Story's decision in *Swift v. Tyson*, sternly rejecting as did Gray the notion that there is a "transcendental body of law" to be discerned by federal courts from sources outside the governing authorities of the states. Story's doctrine he declared to be "an unconstitutional assumption of power

219. *In* Felix Frankfurter, ed., *Mr. Justice Holmes and the Supreme Court* 3 (Cambridge, Mass., 1938).

220. Baker, *The Justice* 267–68 (cited in note 191).

221. "The Use of Law Schools," *in* Holmes, *Collected Papers* 35, 42–46 (cited in note 96) ("Holmes, 'Use of Law Schools' ").

222. See White, *Holmes* 202–6 (cited in note 190).

223. Holmes to Felix Frankfurter, 15 July 1913, quoted in *id.* at 206.

224. "Despondency and Hope," Remarks at a Dinner of the Chicago Bar Association, 21 Oct. 1902, *quoted by* Posner, *Essential Holmes* 150 (cited in note 97).

by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."[225]

Holmes as judge also established himself as a world-class aphorist. Whether he was, as Thomas Grey describes him, "the great oracle of American legal thought"[226] perhaps remains an open question. It is arguable that there is little more to Holmes as oracle than his delphically mysterious style. Some have in fact suggested that he was a victim of his literary talent, that it caused him to sound his powerful horn for a "muddle of mutually inconsistent ideas." Like Shakespeare, he can be quoted by both sides on many issues. As with some parts of the Bible, or other religious texts, the message is confounded by the elegance of the expression.

If Holmes was the great oracle, it is perhaps because no great harmonic synthesis of law is consistent with the premises of American constitutional democracy, where power is diffused to prevent the rise of great conductors or composers who might orchestrate the powers of the state to make them harmonious. Perhaps the best we can do is to articulate occasional propositions as precisely and as elegantly as circumstances permit, without excessive hope for coherence or expectation even of consistency. If so, we must tolerate if not admire the cacophony that results.

Perhaps too it was the foresight of that frustration that caused him to add as a reason for giving up academic life his conviction that "[T]he field for generalization inside the body of the law was small, that the day would soon come when I felt that the only remaining problems were of detail and that as a philosopher [I] must go over into other fields."[227] Convinced that law like God is in the details, Holmes supposed that a wise lawyer should accept that "the universe has more in it than we understand."[228] In this secular agnosticism, Holmes may indeed have sounded the essence of democratic law. Certainly he sounded a reason why Langdell's legal theory was doomed from the beginning as an account of how law works in its relation to American politics.

V. THE CASE METHOD

A. Universal Acceptance

Even before the advent of Langdell, there were at least two influential law teachers making substantial use of judicial opinions in their teaching. William Gardiner Hammond used cases in his teaching at Iowa in the late

225. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1921).

226. Grey, "Holmes and Legal Pragmatism," 41 *Stan. L. Rev.* 787 (1989).

227. *Quoted in* Baker, *Holmes* 270.

228. "The Profession of the Law," Lecture at Harvard University, 17 Feb. 1886, *in* Holmes, *Collected Papers* 29 (cited in note 96).

1860s; Hammond was not a Langdellian but a legal historian and an admirer of Francis Lieber.[229] John Norton Pomeroy had employed a variant on the case method at New York University in the 1860s and as the basis of the second-year curriculum when he returned to law teaching at Hastings in the 1870s.[230]

Elsewhere, the method was often first established by emissaries from Harvard.[231] In 1891, William Keener[232] left Harvard for Columbia. Despite Theodore Dwight's repugnance to the case method, Columbia's Trustees hired Keener for the express purpose of introducing it.[233] He achieved the Trustees' purpose and soon displaced Dwight as dean, but he departed from Langdell's practice by also placing in his students' hands a standard text.[234] Keener also effected a momentary disruption of the relation between the Columbia Law School and the teaching of politics.[235]

John Henry Wigmore, a Harvard graduate close to Thayer, a comparatist and no theorist of legal purity,[236] brought the case method to Northwestern in 1893.[237] Harry Richards effected the conversion at Wisconsin at the same time.[238] Eugene Gilmore was, however, the intellectual leader of

229. Hammond was the founder of two law schools, Iowa and Washington University. Emlin McClain, "William Gardiner Hammond," *in* William Draper Lewis, ed., 8 *Great American Lawyers* 191, 220–21 (1909). He was also the editor of the posthumous edition of Lieber's *Hermeneutics* (cited in note 34).

230. Pomeroy and his method are described in Thomas Garden Barnes, *Hastings College of Law: The First Century* 88–116 (San Francisco 1978).

231. See generally Reed, *Training* 369–85 (cited in note 7); Stevens, *Law School* 60–63 (cited in note 11).

232. William A. Keener, Harvard Law '78, was appointed to the faculty in 1883. He was appointed Story Professor in 1888. 2 Warren, *History* 432, 443 (cited in note 1). The next year, he resigned in a salary dispute. Williston, *Life and Law* 129–30 (cited in note 9). He was promptly appointed at Columbia and was soon appointed dean, replacing Dwight in 1891. Goebel, *History* 135–58 (cited in note 22). In "The Inductive Study of Law," 28 *Am. L. Rev.* 713 (1893), he defended the method as a source of "mental discipline," not scientific law. See also William A. Keener, Preface, *Selection of Cases on the Law of Quasi-Contract* (New York, 1888).

233. Goebel, *History* 118–22.

234. *Id.* at 143.

235. Professor Burgess, who had held a joint appointment in Law and Political Science, was eased out of the law faculty by Keener. But he and several others continued teaching in the Law School. *Id.* at 148–49. Keener left the deanship in 1901. The Law School returned to the broader intellectual horizons afforded by Kent and Lieber with the appointment of Harlan Fiske Stone as dean in 1910. For the ensuing two decades, it was the cockpit of efforts to blend professional training with wide-ranging inquiry. *Id.* at 215–305; Brainerd Currie, "The Materials of Law Study (Part III)," 8 *J. Legal Educ.* 1 (1955).

236. Wigmore was politically active throughout his long career, which he commenced teaching law as a comparatist on the faculty of Keio University in Tokyo. Roalfe, *Wigmore* 21–31 (cited in note 213).

237. *Id.* at 61.

238. Charles N. Gregory had been the first emissary from Harvard, but he had failed to persuade most of those teaching there. Richards came as dean a few years later. William R. Johnson, *Schooled Lawyers: A Study in the Clash of Professional Cultures* 107, 120–33 (1978) ("Johnson, *Schooled Lawyers*"); W. Scott Van Alstyne, "The University of Wisconsin Law School: An Outline History," 1968 *Wis. L. Rev.* 321, 326–27.

the Wisconsin faculty during the deanship of Richards; he was no Langdellian, but led his colleagues into public service, adapting the law school to what was then known as "The Wisconsin Idea."[239] Also in the 1890s, William Howard Taft, as dean, introduced the case method at the University of Cincinnati Law School.[240] Politically conservative though he was, Taft was also a sitting federal judge engaged in the public life of the city; he perceived no bright Langdellian line between law and politics.[241]

In 1902, Joseph Henry Beale, at the time a true Langdellian,[242] was appointed Acting Dean to found the University of Chicago Law School.[243] The case method was employed by all its teachers, but despite assurances given as an inducement to Beale to come, none of the other members of the founding faculty were adherents of the Langdell theory of legal purity. Ernst Freund, the intellectual leader of that faculty was an academic descendant of Francis Lieber,[244] a political scientist as well as a lawyer, a political ally of Jane Addams, and a teacher of administrative law and legislation.[245] Freund used the case method, although it was said that he lacked talent for that form of instruction.[246]

Henry Wade Rogers, appointed dean at Yale in 1903, employed the case method and presided over the appointment of colleagues who did the same.[247] Rogers had himself first studied law with Cooley at Michigan and succeeded Cooley as dean there. He had also been President at Northwest-

239. Gilmore was deeply involved in the Progressive Movement in Wisconsin. He later served as President of the Association of American Law Schools and of the University of Iowa. His views on legal education are set forth in "Some Criticisms of Legal Education," 7 A.B.A.J. 227 (1921). On the university's role in the state, see Charles McCarthy, *The Wisconsin Idea* (Madison, Wis., 1912).

240. Henry F. Pringle, *The Life and Times of William Howard Taft* 125 (New York, 1931).

241. Frederick C. Hicks, *William Howard Taft: Yale Professor of Law and New Haven Citizen* 46–87 (New Haven, Conn., 1945).

242. Grey denotes Beale as "the philosopher of classical orthodoxy." 45 *U. Pitt. L. Rev.* at 29 (cited in note 6). See, e.g. Joseph Henry Beale, "The Developments of Jurisprudence during the Past Century," 18 *Harv. L. Rev.* 271 (1905). Yet, upon his return from Chicago in 1904, Beale pursued a new interest in public law. *The Law of Rate Regulation with Special Reference to American Legislation* (Boston, 1906). One wonders whether this reflected the influence on him of his Chicago colleague, Ernst Freund. On the rivalry between the two, see Frank L. Ellsworth, *Law on The Midway: The Founding of the University of Chicago Law School* 68–74 (Chicago, 1977) ("Ellsworth, *Law on the Midway*"), and Oscar Kraines, *The World and Ideas of Ernst Freund* 86 (Tuscaloosa, Ala., 1974) ("Kraines, *Freund*"). Bealism was the object of scorn in Jerome Frank, *Law and the Modern Mind* 53–61 (reprint, Gloucester, Mass., 1970), and in Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws* (New Haven, Conn., 1942), *passim*.

243. The story is fully told in Ellsworth, *Law on the Midway* 60–78.

244. He earned a Columbia doctorate with Frank Goodnow, Lieber's student who was teaching in the program established at Columbia by Lieber.

245. See generally Kraines, *Freund*.

246. Paul L. Sayre, "A Common Law of Administrative Powers," 18 *Iowa L. Rev.* 241, 243 (1933).

247. "Yale Cases" had been printed for use of Yale students as early as 1891, but the method was not used before Rogers's time. Frederick C. Hicks, *Yale Law School 1895–1915: Twenty Years of Hendrie Hall* 43–44 (New Haven, Conn., 1938).

ern and had there hired Wigmore. He was politically active and was to become a federal judge in 1913.[248] He was at no time under the influence of Langdell's theory, but favored the case method for quite different reasons.[249]

Indeed, no one at Yale could have been counted among the ranks of Langdellians. At the time of Rogers's arrival, the preeminent Yale Law teacher had been Simeon Eben Baldwin. Baldwin led the resistance to the case method within the American Bar Association,[250] and its adoption for general use was his "severest defeat."[251] Although Baldwin manifested the tendency of his age toward formalism, he was also a social scientist and the founder in 1875 of the first graduate program in law and social science.[252] During all the years he taught at Yale, he also practiced as a railroad lawyer,[253] and he concluded his career as a governor and senator.[254] As a political theorist, he was decidedly pragmatic[255] and won the admiration of Holmes.

Among Baldwin's contemporaries at Yale had been Theodore Dwight Woolsey and his son, Theodore Salisbury Woolsey, both internationalists and editors of Lieber's posthumous work.[256] The first Yale Law teachers to employ the case method were Rogers and young Arthur Linton Corbin.[257] Corbin worked out his own variation on the case method in ignorance of what Langdell was doing or saying.[258] He devoted a significant part of his

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248. Charles E. Clark, "Henry Wade Rogers," *in* Dumas Malone, ed., 18 *Dictionary of American Biography* 97 (1926) ("Clark, 'Rogers' ").

249. Rogers was, however, disesteemed by Corbin and Llewellyn. Twining, *Llewelyn* 98 & 416–17 n.56 (cited in note 172).

250. Baldwin was the founding spirit of the American Bar Association. He was also a member of the Supreme Court of Connecticut while teaching at Yale and in that role manifested a tendency to formalism common to his age. He was, however, a pioneer of social science and organized a graduate program in law and social science. By the time of Rogers's arrival, Baldwin's role in the law school was marginal to his political career as governor and then senator. Frederick H. Jackson, *Simeon Eben Baldwin: Lawyer, Social Scientist, Statesman* 125–32 (New York, 1955) ("Jackson, *Baldwin*").

251. *Id.* at 128. Baldwin had published *Illustrative Cases on Railroad Law* (New Haven, Conn., 1896).

252. See Simeon E. Baldwin, "Graduate Courses at Law Schools," 11 *J. Soc. Sci.* 132 (1879).

253. His most celebrated work was in this field, and it led to the observation that he was "no closet thinker" but "had been through it all." Letter of Alfred R. Russell to Baldwin, 16 Nov. 1904, *quoted by* Jackson, *Baldwin* 147.

254. For an account of his later political travails, see Charles C. Goetsch, *Essays on Simeon E. Baldwin* (Storrs, Conn., 1981).

255. See, e.g., his *Modern Political Institutions* (New York, 1898). And on his aims as a law teacher, see *The Relations of Education to Citizenship* (New Haven, Conn., 1912). They appear to reflect the influence of Lieber and are in the antebellum tradition.

256. The senior Woolsey, then the Yale President, had edited posthumous editions of Lieber's *Civil Liberty and Self Government* (Philadelphia, 1874) and his *Manual of Political Ethics* (Philadelphia, 1875). His son edited a fourth edition of the former work in 1901. Lieber's work was used in teaching Constitutional Law at Yale for over a half-century.

257. The story is told by LaPiana, *Logic and Experience* 143–47 (cited in note 44).

258. The story is told in Twining, *Llewelyn* 26–34 (cited in note 172).

career to undoing the influence of persons identified as Langdellians on the law of Contracts.[259]

By 1910, the case method was in use in most American university law schools. Perhaps there were here and there teachers or schools who adopted the case method in the hope of establishing law as an empirical science. But most who adopted the method were pragmatists who took the traditionally American instrumentalist view of their subject. The moment for law as science had passed.

B. Resistance

The resistance of students and colleagues at Harvard to Langdell's teaching method was pale compared to that manifested elsewhere. The attacks were generally as ill-reasoned as Langdell's advocacy of his method. The objections were various and not always consistent.

As early as 1876, Langdell's method was attacked by lawyers for misinforming students; misinformation was said to result from placing before them opinions that were wrong, not authoritative, not the law.[260] It was a little later widely proclaimed that the method was an inefficient means of transmitting knowledge of legal doctrine, a charge that was seldom denied. An 1891 report of Baldwin's committee of the American Bar Association argued that the method would encourage litigation by developing lawyers ignorant of correct doctrine and therefore willing without compunction to litigate either side of any dispute.[261] In 1892, another committee of the Association argued against training the law student "to think that he is to be a mere hired gladiator."[262] Wisconsin's Dean Bryant resisted the case method as promoting intellectual rigidity and excessive devotion to the doctrine of precedent.[263]

More astute critics challenged the elitism of the case method. To the extent that the method required substantial extension of the period of study, it had the adverse social effects previously stated. And it is not unlikely that by making law study more difficult, it screened out of the profession some persons unwilling or unable to do the independent thinking required by the method. For these reasons, Alfred Z. Reed, a prudent and disinterested observer, argued in his 1921 Report to the Carnegie Commission that the method should not be employed in schools training lawyers to serve less elite clienteles.[264]

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259. Gilmore, *American Law* 79–80 (cited in note 5).
260. "The Higher Legal Education," 1 *Cent. L.J.* 540 (1876).
261. 14 *ABA Proceedings* 332 (1892).
262. 15 *ABA Proceedings* 340 (1893).
263. Johnson, *Schooled Lawyers* 117 (cited in note 238).
264. Reed, *Training* 274, 382 (cited in note 7).

Despite these reservations and objections, the case method was by 1930 almost universally employed by those teaching law in American universities. Indeed, by about that time, it had become *de rigueur* because law students expected to study cases and questioned the competence of teachers who did not employ the method.

Nevertheless, resistance abides. Some of it came from teachers such as Jerome Frank who decried "library schools" and called for clinical schools built on the medical school model.[265] His cry was partially answered decades later by the Ford Foundation, which spent a substantial sum to sponsor clinical legal education; the Ford program seemed at the outset to have a moral and/or a political agenda,[266] but in its last years seemed preoccupied with applied skills[267] that are now often taught as a supplement to the case method. Its moral implications are now perhaps as open to question as are those of the case method.[268]

Some contemporary criticism of legal education has rested on the premise that the case method subtly infects students with "political beliefs every bit as conservative as those of Joseph Story."[269] Langdell, it is true, shared with Story the political belief that there is or should be but one American common law serving all states. That ideology underlay his use of the case method. In addition to his nationalism, Langdell's teaching also celebrated the importance of private law and, perhaps by implication, celebrated market capitalism. Neither of these political positions seem to have been fully shared by Langdell's contemporaries who used the case method. Gray explicitly rejected the idea of a national common law, and Thayer was a teacher of public law.[270] Neither nationalism nor market capitalism is necessarily fostered by Langdell's method. To the extent that the method influences the political beliefs of students, it is likely that its effects have been

265. "Why Not a Clinical Law School?" 81 *U. Pa. L. Rev.* 908 (1932).

266. See David Barnhizer, "The University Ideal and Clinical Legal Education," 35 *N.Y.L. School Rev.* 87 (1990); see also Seligman, *High Citadel* 160–75 (cited in note 90).

267. Robert F. Condlin, "The Moral Failure of Clinical Legal Education" in David Luban, ed., *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* 335 (Totowa, N.J., 1988); but see Norman Redlich, "The Moral Value of Clinical Legal Education: A Reply," 33 *J. Legal Educ.* 613 (1983); see generally Stevens, *Law School* 240–41 (cited in note 11).

268. See also Robert F. Condlin, " 'Tastes Great, Less Filling': The Law School Clinic and Political Critique," 36 *J. Legal Educ.* 45 (1986); Kenny Hegland, "Condlin's Critique of Conventional Clinics: The Case of The Missing Case," 36 *J. Legal Educ.* 427 (1986); Joseph H. Stark, Philip D. Tegeler, & Noreen L. Channels, "The Effect of Student Values on Lawyering Performance: An Empirical Response to Professor Condlin," 37 *J. Legal Educ.* 409 (1987).

269. Seligman, *High Citadel* 36. Cf. Paul N. Savoy, "Toward A New Politics of Legal Education," 79 *Yale L.J.* 444 (1970); David Kairys, ed., *The Politics of Law: A Progressive Critique* (New York, 1982) ("Kairys, *Politics of Law*").

270. It is likely that the three-year curriculum, by giving such a prominent place to private law, has had a long-term effect on the political thinking of lawyers. Duncan Kennedy, "The Political Significance of the Law School Curriculum," 14 *Seton Hall L. Rev.* 1 (1983). That is not, however, a direct or necessary consequence of the use of the case method.

centrist.[271] Perhaps for this reason, the complaint about its political effects are most likely to come from those holding marginal political views.

The most enduring resistance to 20th-century law teaching has come from students made sullen or hostile by their law school experience, who identify the classroom exchange and thus the case method as the cause of their distress.[272] Jerold Auerbach became so hostile as a result of a semester of law at Columbia that he was moved to devote years of study to demonstrating that lawyers are generally bad people.[273] John Osborne was moved to write a novel about the sadism of his semifictional law teacher, Professor Kingsfield.[274] The young Duncan Kennedy was moved to wonder in print if his teachers had sex lives.[275] Scott Turow described the Harvard Law School of his time as an asylum for the disturbed.[276] Joel Seligman, in his more general critique of the same institution, noted with restraint that "[o]n occasion, some law school professors have been insensitive to the emotional vulnerability of their students."[277]

Among the now thousands who have taught American law in the 20th century, there must have been more than a few who brought to their teaching the same defects of character as Pilot Brown, one of the masters who taught Mark Twain to pilot riverboats, and who evoked in their students Twain's response to the overbearing Brown:

> The moment I was in their presence, even in the darkest night, I could feel those yellow eyes upon me, and know that their owner was watching for a pretext to spit out some venom on me. . . . I often wanted to kill Brown, but this would not answer. . . . However, I could imagine killing Brown; there was no law against that; and that was the thing I used always to do the moment I was abed. Instead of going over my river in my mind, as was my duty, I threw aside business for pleasure and killed Brown.[278]

Those who react to their law teachers collectively as Twain reacted to Brown have received some disinterested support. For decades, psychiatrists and psychologists have questioned the consequences of aggressive law

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271. The reasons for this are stated below, text at notes 347–57.

272. On the differences between alienation and hostility, see Paul D. Carrington & James Conley, "The Alienation of Law Students," 75 *Mich. L. Rev.* 887 (1977), and *id.*, "Negative Attitudes of Law Students: A Republication of the Alienation and Dissatisfaction Factors," 76 *Mich. L. Rev.* 1036 (1978). There was in those studies little to suggest that variations in law school teaching methods could account for either.

273. Auerbach, *Unequal Justice* (cited in note 12), and see especially "Plague of Lawyers," *Harper's*, Oct. 1976, at 37.

274. The villain of John J. Osborne, *The Paper Chase* (Boston 1971).

275. 1 *Yale Rev. L. & Soc. Action* (cited in note 10).

276. *One L* (New York, 1977).

277. *High Citadel* 155 (cited in note 90).

278. *Life on the Mississippi* 123–24 (Heritage Press ed. New York, 1944) ("Twain, *Mississippi*").

teaching for the mental health of students.[279] Social psychologists have sometimes alleged that 20th-century American law teaching engenders undesirable traits.[280] There is some evidence that contemporary legal education is injurious to intimate relations.[281]

Law teachers, too, have questioned the effects of classroom interaction. Roger Cramton worries that the unstated assumptions underlying much discussion are likely to produce cynicism and self-aggrandizement.[282] James Elkins has summed up what is now perhaps almost a conventional view: "Law schools turn out to be engaged in a kind of reverse alchemy, turning the gold of idealism to the heavy lead of professionalism."[283]

C. Benefits: Competence, Efficiency, Status

In light of the criticisms and concerns, some question the continuing utility of the case method.[284] The method survives, however, because its demerits are often also its merits.

Even the most militant opponent of the case method emphasized the need for the sort of exchange fostered by it. Simeon Eben Baldwin concluded his valedictory summation to law students with advice responsive to those who protest:

> The members of [a law school class] are not to be treated like school-boys. . . . To make [their] recitation most useful, . . . [t]here should be an opportunity, daily, to ask every man who is willing, two or three questions during the hour. A few will be unwilling, or but half-willing. A plan often tried is to assign a certain number of the front seats in the class-room to those who are willing, and to assume that those who, on any day, sit elsewhere are not prepared to be questioned.

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279. See Marilyn Heins, Shirley Nichols Fahey, & Roger C. Henderson, "Law Students and Medical Students: A Comparison of Perceived Stress," 33 *J. Legal Educ.* 511 (1983); Bernard L. Diamond, *Psychological Problems of Law Students in Looking at Law Schools* 19 (Stephen Gillers ed., New York, 1977); James B. Taylor, "Law School Stress and The Deformation Professionelle," 27 *J. Legal Educ.* 251 (1975); Alan A. Stone, "Legal Education on the Couch," 85 *Harv. L. Rev.* 392 (1971); Andrew S. Watson, "The Quest for Professional Competence: Psychological Aspects of Legal Education," 37 *U. Cin. L. Rev.* 93 (1968); Leonard D. Eron & Robert S. Redmount, "The Effect of Legal Education on Attitudes," 9 *J. Legal Educ.* 431 (1957).

280. E.g., G. Andrew Benjamin, Alfred Kozniak, Bruce Sales, & Stephen B. Shenfield, "The Role of Legal Education in Producing Psychological Distress among Law Students and Lawyers," 1986 *A.B.F. Res. J.* 225.

281. Faith Dickinson, "Psychological Counseling of Law Students: One Law School's Experience," 37 *J. Legal Educ.* 82, 87 (1987).

282. "The Ordinary Religion of the Law School Classroom," 29 *J. Legal Educ.* 247 (1978).

283. "The Quest for Meaning: Narrative Accounts of Legal Education," 38 *J. Legal Educ.* 577, 585 (1988).

284. E.g., Woodard, 54 *Va. L. Rev.* at 727 (cited in note 4).

> The shy man, . . , the man who feels above being questioned like a boy, the shirk and the dunce, can then keep to the rear if they choose.
>
> But it may be predicted of any such class that the successful lawyers in it will almost always come from the front seats. The legal profession demands promptness, alertness, readiness to seize and improve every fair chance of fair advantage. These are things for the law student to cultivate, lest, when his day of judgment comes, it is found that the shy man is shy still, the shirking man a shirk still, the stupid man a dunce still, the airy man airy still. They may all build up for themselves a better character, and the front seat of the classroom is a good place to begin.[285]

The importance to law students of the kind of experience the case method affords was understood long before Baldwin's time; George Wythe's students learned quickly both to fear and to value their exposure to an audience of fellow students.[286] Granted that some 20th-century law teachers have possessed the hateful flaws of Pilot Brown, there have been more than a few others recognized by their students as having the more endearing traits of Pilot Bixby, Twain's principal master. Bixby was extremely harsh with Twain at times.[287] But clearly Twain came to recognize in Bixby a supportive purpose: Bixby wanted Twain to succeed in his work and was doing what he could to secure that result, even though his methods were often bruising to his cubs.

William Keener, the Columbia dean, was one such valued law teacher. He was described as "brutally aggressive" in class:

> He would assault a student with rapid fire searching, provocative questions that soon drove the unwary legal neophyte into a ridiculous and untenable position. He seemed determined to prove to each student called up for interrogation that he was completely unqualified to discuss intelligently any legal point. The students thought him almost sadistic in his ruthless disregard for their personal dignity. The first reaction was a bitter hatred of this man who had so humiliated them; then there arose a deep determination to be so thoroughly prepared for the next encounter as to turn the tables on the persecutor; then finally there emerged the discovery that as a result of his daily preparation for battle with Keener the student had learned more than he had learned from any other teacher in the Law School.[288]

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285. *The Young Man and the Law* 128–29 (New Haven, Conn., 1930).

286. See remarks of Senator John Brown *quoted in* E. Lee Shepard, "George Wythe," *in* W. Hamilton Bryson, ed., *Legal Education in Virginia 1779–1979* at 753 (1982).

287. Twain, *Mississippi* 39–89.

288. Goebel, *History* 138–39 (cited in note 22).

Gray thought Keener in his enthusiasm for teaching perhaps a bit too hard on students,[289] but Pound rated him perhaps the best of all his teachers, and among the best ever to teach at Harvard.[290] It was in time learned by his students that Keener would respect disagreement if well prepared and presented and that he was gentle in dealing with the personal problems of his students.[291]

While Keener was exceptional, others prodded their students more gently, albeit also stressfully. It was said of Henry Wade Rogers, the Yale dean, that "his classroom methods reduced the most strong-minded of his students to a state somewhat akin to panic." His manner was mild enough, yet he subjected students to "skillful, merciless and persistent cross-examination."[292] Hear also Learned Hand, speaking at the end of his long and very distinguished public career, about the contribution of his Harvard teachers, who included Langdell, Ames, Keener, Gray, and Thayer:

> More years ago than I like now to remember I . . . was dissected by men all but one of whom are now dead. . . . The memory of those men has been with me ever since. . . . From them I learned that it is as craftsmen that we get our satisfactions and our pay. In the universe of truth, they lived by the sword; they asked no quarter of absolutes and they gave none.[293]

Or hear Thurgood Marshall speaking of his teacher at Howard, Charles Hamilton Houston:

> First off, you thought he was a mean so-and-so. He used to tell us that doctors could bury their mistakes but lawyers couldn't. And he'd drive home to us that we would be competing not only with white lawyers but really well-trained white lawyers, so there just wasn't any point in crying in our beer about being Negroes. . . . He was so tough we used to call him 'Iron Shoes' and 'Cement Pants' and a few other names that don't bear repeating. But he was a sweet man once you saw what he was up to. He was absolutely fair, and the door to his office was always open. He made it clear to all of us that when we were done, we were expected to go out and make something of our lives.[294]

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289. *Id.* at 118.

290. Sutherland, *Law at Harvard* 201–3 (cited in note 2).

291. Goebel, *History* 139–40.

292. Clark, "Rogers" at 97 (cited in note 248).

293. *The Bill of Rights* 77 (Cambridge, Mass., 1958).

294. Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* 127–28 (New York, 1976) ("Kluger, *Simple Justice*"). On Houston's teaching, see more generally Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* 57–128 (Philadelphia, 1983).

Houston's distinguished black colleague, William Hastie, coined a slogan for Howard students: "No tea for the feeble, no crape for the dead."[295]

Why would many of the students of Keener and Houston form the opinion that they were being helped, even empowered, by law teachers worthy of the name "Cement Pants?" There were many reasons that, despite its blemishes, the case method as modified by teachers such as Thayer and Gray, was a winner with generations of students and lawyers.

One reason, no doubt, was that the case method provided students with a rite of passage serving as an emblem of professional status.[296] As President Eliot had observed in 1875, many covet such emblems. In the technocratic society that emerged after 1870, academic rigor was not merely a necessity, but an inevitability in light of what was happening in other professions. As one recalcitrant at Yale conceded: "Institutions must meet the demands of their time, right or wrong, or cease to be institutions, for lack of disciples."[297] But there was more to the method than a status symbol. How so?

While those advocating the method seldom invoked the theory of Langdell, they also seldom troubled themselves to offer a thoughtful alternative explanation of their purpose. The explanation most often given was that the case method enabled students to learn vaguely defined intellective skills sometimes brought together under the rubric of "thinking like a lawyer." As Charles Gregory explained to the lawyers of Wisconsin: "[T]his system teaches *how* to learn law, instead of learning so much of it. It is rather a mental fitting."[298] This became the usual explanation. Even James Barr Ames, Langdell's most faithful disciple, who edited nine casebooks, had by 1907 forsaken the Langdellian argument that a unitary truth could be forged from the texts of the opinions he required his students to interpret.[299] In that year, he explained the method not as a source of pure law but as a means of stimulating independent professional thinking.[300]

This explanation resonated with the justification most frequently given for college training by 19th century educators, that higher education developed "mental discipline."[301] By the early 20th century, that rationale for undergraduate education was in disrepute, partly displaced by more technocratic or utilitarian aims. But as a purpose of law study, intellectual matu-

295. Kluger, *Simple Justice* 126.

296. James A. Elkins, "*Rites de Passage:* Law Students 'Telling Their Lives,' " 35 *J. Legal Educ.* 26 (1985); compare John Henry Schlegel, "Langdell's Legacy, Or The Case of the Empty Envelope," 34 *Stan. L. Rev.* 1517 (1984).

297. Edward J. Phelps, "Methods of Legal Education," 1 *Yale L.J.* 139, 143 (1892).

298. Johnson, *Schooled Lawyers* 115–16 (cited in note 238).

299. In fact, Ames may never have been in this sense a purist, although he sometimes sounded as one. See Grey, 45 *U. Pitt. L. Rev.* at 29 n.102 (cited in note 6).

300. Warren, *Harvard Centennial* 81 (cited in note 115).

301. Veysey, *Emergence of the University* 21–56 (cited in note 15).

ration was a new idea consonant with technocratic, professionalizing ambitions.

There is in fact a range of describable and professionally useful intellective skills and habits plausibly created or enlarged by case method teaching. The central consequence of the method was to provide a focus and parameters to discussion between teacher and student and among students of the sort that Baldwin sought to create by other less effective means. Without classroom dialogue, the case method is a potential hero with no role to perform.

There are several reasons why, as Baldwin perceived, critical dialogue is beneficial to students. First, by participating in dialogue, even vicariously, students are impelled by peer pressure to enlarge their skills of reading, speaking, and listening. Cases generally contain some features that are readily accessible even to casual readers, but careful reading and thinking is often rewarded by greater discernment. That discernment can be revealed and tested in daily discussions, roughly in proportion to the effectiveness of the teacher in evoking dialogue.

Cases, being narratives,[302] also serve to stimulate interest, at least when compared with the tedium of reading or hearing recitations of legal doctrine unadorned by such narratives. Interest likewise enhances retention: reading cases is not direct experience with human conflict, but it is closer to real experience than reading texts or listening to lectures and many cases do imprint on the mind of the reader in ways that texts do not.

Studying cases also lends a practical bent to the thinking required of the student: cases are problems and students reading cases are, like lawyers, trying to solve problems. The method hones the student's sense of relevance as he or she acquires the habit of distinguishing between ideas that are useful to the solution of particular problems and those that are not.

Also, the case method, although not "leveling the playing field," makes the dialogue between teacher and student more nearly equal. While there are those who find the prodding tyrannical, there is more democracy in the case method classroom than in a lecture hall, and it is generally much less hierarchical than the courtrooms and board rooms in which students hope to appear.[303] Part of the discussion proceeds at a level that enables everyone to comprehend and participate. Moreover, a student can expect at least sometimes to comprehend a particular case almost as well as (and on rare occasion better than) the teacher.[304] The discovery that this is so gives encouragement to intellectual independence. The case method teacher is cast

302. Granted, the narratives can be desiccated, the litigants almost dehumanized. John T. Noonan, *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of Masks* (New York, 1976).

303. But see Kennedy, 32 *J. Legal Educ.* (cited in note 109).

304. An instance of this brought Langdell into disrepute with his students. Fessenden, 33 *Harv. L. Rev.* at 501 (cited in note 115).

somewhat in the role of a judge, but with less power over those in a subordinate position. In being required to engage in public dialogue with a teacher, students are eased into the role of advocacy in a public forum before a genuine authority figure.

Reading and discussing cases enhances professional judgment in ways that passive learning cannot. Professional judgment is the skill of predicting what those who apply the lash of power will do with it in a given foreseeable circumstance. It is essential in evaluating claims and defenses, or arguments that might be presented to a tribunal. Reading and discussing opinions of courts enhances that skill. To read carefully and understand an opinion of the court is to enter the mind not only of its author, but also of others who signed it, and still others who will read it and invoke it as precedent. To predict the use of power by others, a lawyer must lay aside his or her own idiosyncratic impulses, suppress wishful thinking, and think professionally as those likely to exercise the power are likely to think.

To lay aside one's idiosyncratic impulses while doing professional work, it is necessary first to know what they are. This requires self-knowledge. Langdell's students were right in thinking that they had no need to know what a classmate thought of a dissenting opinion, but they were afforded an opportunity to learn much about the law and themselves if they gave critical attention to the causes of the dissenter's defeat, of their classmates' reaction to it, and of their own reactions to the utterances of others. Active dialogue and reflection upon dialogue are good, and perhaps the best sources of self-knowledge, and hence the best source of sound professional judgment.

The sense that these intellective skills are being acquired and can be employed in the case method class sometimes produces a powerful stimulus to learning that is almost independent of the skills being acquired. With a skillful teacher and well selected cases, students can become passionately involved in their material to a degree not likely to be found among auditors in the lecture hall. Barbara Nachtiel Armstrong, one of the first women to be appointed a law professor, regularly so challenged and excited her students that it was necessary to appoint a sergeant-at-arms to maintain order in her classroom.[305]

There is no doubt that the risk of embarrassment before a large audience of classmates is daunting to many students, especially those of a perfectionist bent expecting ever to excel. But professional work must often and perhaps ordinarily be performed under equal or greater duress. Professors Kingsfield may in this respect be performing an important service for their students, and especially for those who are most intimidated. Valuable lessons to be learned from such teachers include learning that moments of

305. Sandra Pearl Epstein, "Law at Berkeley: The History of Boalt Hall" at 228 (unpub. thesis, 1979) (in Boalt Hall Library).

embarrassment are soon passed, that no one is always excellent, and that most of us can withstand far more duress of that kind than we are accustomed to. Teachers unwilling to cause such pain even though instructive in these ways are not as helpful as they might be to students preparing themselves to deal with human conflict.

On this account, it seems probable that the benefits of case method teaching have diminished in recent decades. Not only are law teachers more concerned about possible real harm to students to which observers point, but they are also perhaps somewhat daunted by heightened concern that students will perceive them to be doing harm.[306] No teacher wishes to be thought of as the destructive Pilot Brown, and many therefore fear to play the benign but demanding role of Pilot Bixby, especially if their teaching is to be evaluated on the basis of immediate student reaction rather than longer term effects.[307] The fear of being seen as Pilot Brown may be increasingly acute for white male teachers working with female[308] or minority students whose mistrust is already visibly elevated. In any case, it is my sense that a real "Cement Pants" is not easy to find in 1994.[309]

Nevertheless, even if class discussion is less demanding than it was two decades ago, the case method may yet in many ways enhance competence of those students who respond energetically to the opportunity it affords. Its product can be crudely measured and can be sold in the marketplace or used in a variety of endeavors, including public service.

Not only is the method effective, it is also efficient. It enabled good teachers to animate and activate students in large, sometimes very large, classes. While medical and graduate schools were lowering their teaching ratios to the levels needed to provide the intimacy of apprenticeship training, law schools could be conducted with relatively few faculty members. The primary beneficiaries of this economy may have been the "captains of erudition" who skimmed off some law tuition revenue to fund other ventures. But it also contributed to the general availability of legal education almost everywhere in America.[310] While the programmatic changes lengthening the period of study increased the investment in human capital required of young people seeking to become lawyers, the adverse social and economic effects of that increase cost were far less than they would have

306. On the enlarged influence of student opinion on law school teaching, see Philip C. Kissam, "The Decline of Law School Professionalism," 134 *U. Pa. L. Rev.* 251, 276–80 (1986).

307. Anthony D'Amato has pointed to this problem. "The Decline and Fall of Law Teaching in the Age of Student Consumerism," 37 *J. Legal Educ.* 461 (1987). See also Kissam, 134 *U. Pa. L. Rev.*

308. The problem is addressed in Stephanie M. Wildman, "The Question of Silence: Techniques to Insure Full Class Participation," 38 *J. Legal Educ.* 147 (1988).

309. Compare Catherine W. Hantzis, "Kingsfield and Kennedy: Reappraising the Male Model of Law School Teaching," 38 *J. Legal Educ.* 155 (1988).

310. Carrington, 44 *Kan. L. Rev.* 1 (cited in note 142).

been had law schools in the 20th century operated at the same teacher-student ratios as medical or graduate schools which were through most of the century far more exclusive than were law schools.[311]

Thus, the case method was not merely fashionably rigorous and sufficiently inexpensive to be more available than much other professional training, but it actually improved the utility and marketability of students' services as professionals. These were attributes sufficient to assure its acceptance in the market place.

D. Relation to Legal Theory

While these enhancements of status and competence may perhaps have been sufficient to cause teachers to employ the case method, it was also pertinent that the method accurately reflected the nature of American law as it had evolved by the beginning of this century. The writings of Holmes and Gray reflected the beliefs of most thoughtful lawyers of their time. Many lawyers and judges recognized that courts have a social and political responsibility; that their responsibility is performed by publishing reasonably convincing institutional opinions; that the utterances of those institutional opinions are themselves legal texts; that law so made is an aggregation of atomized rules, each containing the seed of its own revision; that the political responsibility so exercised is generally inferior to that of other officials elected by vote of the people; and that the political responsibility of the courts is necessarily shared by the profession of whom the judiciary is a part.

This 20th-century perception of the nature of judge-made law was not fundamentally different from that obtaining a century earlier.[312] In their understanding of the nature and sources of law, teachers such as Thayer and Gray and Holmes, were in a general way returning to a vision of law that had been obscured in the middle of the 19th century by a formalism in style

311. This fact has an independent political significance. The American Bar Association has for more than a century striven to match the American Medical Association in elevating professional standards. Because law plays so large a political role in America, they have not enjoyed the same support as has the AMA. Reed, *Training* (cited in note 7) was a report to the Carnegie Foundation concluding that the kind of regulation of medical education achieved pursuant to the Foundation's recommendations would be inappropriate for law. There remains endemic pressure within the organized bar to make legal education much more expensive than it is. E.g., American Bar Association Section on Legal Education and Admission to the Bar Task Force on Law Schools and the Profession, *Narrowing the Gap, Legal Education and Professional Development—An Educational Continuum* (Chicago, 1992) ("Bar Task Force"). To the extent that such efforts succeed, access to legal education diminishes and the price of services rises.

312. "It does not take a very keen intelligence to see from the 19th century law reports and statute books and from what other documents reveal that in practice men in the United States always have adopted an instrumental view of the law." Hurst, 1968 *Wis. L. Rev.* at 336–37 (cited in note 4).

serving to conceal the political nature of American law. That style, seemingly a reaction against the disorder of civil war,[313] had set the stage in 1870 for Langdell's pseudo-scientific theory.

But formalism was receding in 1895 as judges resumed the roles performed early in the century by James Kent and John Marshall. The highest state courts had again begun to see themselves as subordinate but autonomous lawmakers, sometimes informed by opinions of other jurisdictions, but never bound to adhere even to a consensus among such opinions if by their own lights the public would be better served by a "minority rule." Story's opinion in *Swift v. Tyson* was therefore doomed: in this, Gray and Holmes indeed spoke for the century that was to come.[314] Similarly, the federal courts of appeals created in 1891 soon undertook a duty to make federal law for their circuits by interpreting federal legislation in particular applications according to their own lights and by adhering to their own precedents.[315] Not only was there to be no federal general common law, but there was likewise to be a rival to general federal common law as the "law of the circuit" evolved to be a body of federal doctrine wholly the product of the judiciary.[316] And it was increasingly recognized that the Supreme Court of the United States, had a duty operative in each case it decides to deal frontally, in the "Grand Style" of John Marshall, with the social consequences of its decisions.[317] While the Court was thought obliged to interpret the legal texts placed before it faithfully, in a manner plausible to the profession,[318] it was morally responsible for the consequences of its choices among professionally respectable alternative interpretations.

This prevailing 20th-century perception of American law was not the creation of Thayer, Gray and Holmes, or other thinkers, but was a widely shared observation of manifest reality. The reality to be observed was created in important part by the official reporters and by the West Publishing Company in Minnesota.[319] The printing presses of St. Paul had a relationship to American law not unlike that of the steam engine to American

313. For a somewhat contrary view that antebellum treatise writers had already attempted to depoliticize American judge-made law, see Horwitz, *Transformations* (cited in note 99).

314. *Supra* text at notes 179–81 & 215.

315. For a brief account of the evolution of this role, see Paul D. Carrington, "Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law," 82 *Harv. L. Rev.* 542, 580–82 (1969).

316. See Paul D. Carrington, "The Function of the Civil Appeal: A Late Century View," 38 *S.C.L. Rev.* 411, 416–28 (1987).

317. The "Brandeis brief" first appeared in Muller v. Oregon, 208 U.S. 412 (1908). This event confirmed Brandeis's belief that the Court was receptive to consideration of the social and political consequences of its decision. Even the most deplored decision of that era was explained in an opinion that can be condemned as Darwinist but not as blind formalism. Lochner v. New York, 198 U.S. 45 (1905).

318. Paul D. Carrington, "Meaning and Professionalism," 10 *Const. Commentary* 297 (1993).

319. See LaPiana, *Logic and Experience* 106–7 (cited in note 44).

culture at large. The wide circulation given to the opinions of many judges may have been alone sufficient to cause the entire profession to take these utterances more seriously than they were taken before. The profession formed its renewed semitechnocratic identity around that large and growing literature so peculiarly its own.

The publishers of opinions were, of course, merely exploiting the legitimate opportunity created by official reporters who were in turn merely doing what John Marshall had in 1803 called upon them to do when he invented the opinion of the court.[320] Before that time, there were very few reported American, or even English cases. What was reported were the oral comments of individual judges who happened to be sitting when a private person chose to report his utterances. These reports could only with effort be regarded as legal texts. But Marshall's invention caught on quickly and was soon employed in every American jurisdiction to turn self-defensive utterances into legal texts or commands.

By 1820, Joseph Story, among others, was beginning to complain that there were too many reported opinions of the courts.[321] But Story could scarcely have envisioned the deluge of reported opinions that would in 1880 commence to flow without pity from the West printing press. One adversary of the case method, recognizing its source, grieved: "It is easy to find single opinions in which more authorities are cited than were mentioned by Marshall in the whole thirty years of his unexampled judicial life, and briefs that contain more cases than Webster referred to in all the arguments he ever delivered."[322]

West Publishing Company and the lawyers who bought its product created an environment that nurtured literary vanity or pride of opinion among appellate judges, all of whom enjoyed what is every author's heart's desire, the patronage of a press available to publish their every word. In such a setting, law was destined to be acutely "local knowledge."[323] Not only did the flow of judicial verbiage assure localization of judge-made law, but it also facilitated elaboration of legal doctrine in every jurisdiction. Each volume of reports contained another set of distinctions by which the sitting courts freed themselves from the unwelcome constraints of precedents created by their predecessors and deemed unsuitable to the latest case, while

320. See Carrington, 41 *Duke L.J.* at 753–54 (cited in note 60).

321. Story recorded his view in "Address before the Suffolk Bar" (1821) *in* William Story, ed., *Miscellaneous Writings of Joseph Story* (Boston, 1845); cf. David Hoffman, *Syllabus of A Course of Lectures on Law* v. (Baltimore, 1821); 1 James Kent, *Commentaries on American Law* 441 (1826).

322. Phelps, 1 *Yale L.J.* at 141 (cited in note 297).

323. The phrase is Clifford Geertz's. *Local Knowledge in Interpretive Anthropology* (New York, 1983).

they uttered new words intended to constrain their successors and thereby assure greater precision and "reckonability"[324] in the law.

As the bookshelves of law offices expanded exponentially, it was increasingly the task of lawyers to give advice and frame arguments on the basis of their reading of judicial opinions as the most authoritative guides to increasingly complex law. Courts expected citations to pertinent judicial authority, preferably their own, and paid diminishing heed to secondary authorities.

In these circumstances, the case method was not merely a means of elevating the competence of students and making their skills more marketable, it was also perhaps the best available means of revealing the atomized nature of American law. Not only was the case method in that sense a revelation of a truth, but it was a revelation having political utility in its own right. If those in power are entranced by their own institutional utterances, it is well that others so understand. If men of ordinary talents such as "Montagu, Chamberlayne, and Houghton JJ" are to affect "an important division of the law,"[325] it is well that they be advised by counsel who understand what is happening!

It was more American law that made the case method than the case method that made the law. Yet the method may have reinforced some characteristics of the legal system of which it was a part. As the method gained universality, its use may have affected the relative standing of judges, government executives, and legislators in the minds of American lawyers.[326] Our Constitutional tradition seems to have modified itself in this century by enlarging the role of the judiciary. By focusing the profession's attention so heavily on judicial opinions, the case method may have legitimated judicial lawmaking. While the judiciary has remained "the least dangerous branch,"[327] the margin of its relative weakness seems to have diminished.

Reasonable minds may perhaps differ on whether this possible effect, if it exists, is a good thing or a bad. Certainly it has seemed to most of us at one time or another that the enlarged role of the federal judiciary has been necessary or desirable. On the other hand, apprehension about judicial arrogance and usurpation, which was widespread in the mid-19th century in reaction against *Scott v. Sandford*, has reappeared in the last three decades in response partly to some of the more controversial later decisions of the War-

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324. The word is Karl Llewellyn's. *The Common Law Tradition: Deciding Appeals* 17–18 (Boston, 1960).

325. *Supra* text at note 184.

326. It was precisely for this reason that Langdell's method won enthusiastic applause from A. V. Dicey. See his "Training in English Law at Harvard," 13 *Harv. L. Rev.* 412 (1899). Dicey was a believer in the supreme beneficence of judge-made law. *Law of the Constitution* (Oxford, 1885). And he saw little hope of good in anything that Parliament might be induced to enact. *Law and Opinion in England* (Oxford, 1905).

327. *Federalist* 10 (1788); Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis, 1962).

ren Court but also more recently in response to *Roe v. Wade*.[328] It is possible that the case method has contributed to the evolution in the judicial role that produced the latter decision. If so, we may suppose that Thayer and Holmes would have regretted that consequence of the method, not because of any view they might have entertained regarding abortion rights, but because they would clearly have insisted that the existence of such rights is chiefly a matter for legislatures.

Concern for the legitimacy of judge-made law is peculiarly an American concern. Elsewhere, even in England, as Patrick Atiyah observed, care is taken to proclaim a more modest role for judges and there is accordingly little anxiety about the legitimacy of their powers.[329] It is possible that the differences between the materials on which American and English lawyers are trained is a partial cause for this difference. If so, causation again moves in both directions: a reason that Americans have been preoccupied with caselaw is because of the political role of courts established in the 18th century and reinforced by the efforts of Chief Justice Marshall. In governments in which the parliament is supreme or nearly so, and courts perform a less consequential role,[330] there is less reason either to concentrate study on judge-made law or to worry that judges are usurping the roles of the more political organs of the government. Those prone to believe that the case method has encouraged illegitimate speculation by American courts might usefully recall that *Scott v. Sandford*[331] was decided by Justices who had never seen or heard of a casebook.

Another possible secondary consequence of the method may have been to reinforce in the minds of 20th-century American lawyers the Holmesian sense that their law is complex, often uncertain, and subtly changing. Twentieth-century American lawyers are seemingly content to share no general legal theory. It is for most sufficient that they have a method or means or capacity for confronting one problem at a time or for resolving one dispute at a time. Within the framework of a single case or problem, they are generally mindful of the broader consequences and implications of the law, but like Holmes most of them comfortably acknowledge that larger forces are at play than can be understood or controlled by those in the trenches of professional work. This contentment may result from case

328. 410 U. S. 113 (1973).

329. "The Legacy of Holmes through English Eyes," 63 *B.U.L. Rev.* 341 (1983); see also Patrick S. Atiyah & Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study in Legal Reasoning, Legal Theory, and Legal Institutions* 134–50 (1987).

330. The availability of Parliament accounts for the appeal in England of Austin's vision of law. Austin was acutely interested in a theory of legislation, see Austin, *Province of Jurisprudence* Lectures 2–4 (cited in note 108). And Bentham seems to have been the progenitor of the movement to codify the common law. Charles M. Cook, *The American Codification Movement* 74–78, 97–104 (Westport, Conn., 1981).

331. 19 How. 393 (1858).

method learning and may serve to stabilize the prevailing legal style and method.

The lack of legal theory may debilitate lawyers for some tasks. American lawyers, because of their training, may be more apt at solving problems but less apt at envisioning grand goals. It is possible to view the anti-theoretical tendency as a form of anti-intellectualism,[332] for it tends to deny the possibility of useful analysis of the legal cosmos. American lawyers may have difficulty in mounting grand visions such as enlarged conceptions of substantive justice or economic efficiency.[333]

It is perhaps for this reason that American law teaching has been perceived by some as destructive of student idealism.[334] Anthony Kronman has observed that youthful idealism is often associated with adherence to abstractions and absolutes.[335] The case method separates the young idealist from such beliefs, sometimes leaving them for a time at least in a state of mistrust of their own convictions. As Kronman again observes, for some, there is a feeling that they have lost their souls in the first year of law school.[336]

E. Moral Education

For reasons implicit in what has been said, the case method did not displace the teaching of republican morality as an aim of American university law teaching. Those Langdell critics who lumped together all of his efforts and achievements, and decried all things Langdellian as the work of Philistines, have prevented us from seeing clearly the connection between the case method and those traditional moral aims. True, the case method was a triumph of technocracy.[337] But it was not a defeat for the teaching of public virtue.[338] Had it been so, we can be confident that it would not have had the support of Thayer, Gray, and Holmes, or many others who have employed it.

Holmes, of the three Bostonians, was most outspoken in his concern for moral education in law. Although forsaking for himself the role of teacher, Holmes remained during his judicial career close to many law teachers, especially those at Harvard, and he continued to espouse views on

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332. On other causes of anti-intellectualism in law, see generally Francis A, Allen, *Law, Intellect and Education* (Ann Arbor, Mich., 1979).

333. See, e.g., Howard Lesnick, "Legal Education's Concern with Justice: A Conversation with a Critic," 35 *J. Legal Educ.* 414 (1985).

334. E.g. Elkins, 35 *J. Legal Educ.* (cited in note 296).

335. Kronman, *Lost Lawyer* 156 (cited in note 9).

336. *Id.* at 113.

337. This was the protest voiced by John Forrest Dillon in his presidential address attacking Langdell, "The True Professional Ideal," 17 *A.B.A. Rep.* 420 (1894).

338. For a similar development of this point, see Kronman, *Lost Lawyer* 110–16, 155–60.

the learning of law. In speaking to lawyers on the subject, his rhetoric at many points tracks that of the antebellum law teachers. Because such talks confirmed that his values and premises were not distant from those of traditional pre-Langdell American law teachers, they bear quotation at length:

> If a [lawyer] is a specialist, it is most desirable that he should also be civilized; that he should have laid in the outline of the other sciences, as well as the light and shade of his own; that he should be reasonable, and see things in their proportion. . . . [T]he best part of our education is moral. It is the crowning glory of this Law School that it has kindled in many a heart an inextinguishable fire.[339]
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> . . . .
>
> Education, other than self-education, lies mainly in the shaping of men's interests and aims. . . . So I say the business of a law school is not sufficiently described when you merely say that it is to teach law, or to make lawyers. It is to teach law in the grand manner, and to make great lawyers.
>
> Our country needs such teaching very much. . . . When the effervescence of democratic negation extends its workings beyond the abolition of external distinctions of rank to spiritual things—when the passion for equality is not content with founding social intercourse upon universal human sympathy, and a community of interests in which all may share, but attacks the lines of Nature which establish orders and degrees among the souls of men—they are not only wrong, but ignobly wrong. Modesty and reverence are no less virtues of freemen than the democratic feeling which will submit neither to arrogance nor to servility.
>
> To inculcate those virtues, to correct the ignoble excess of a noble feeling to which I have referred, I know of no teachers so powerful and persuasive as the little army of [educated lawyers]. . . . They set the example themselves; for they furnish in the intellectual world a perfect type of the union of democracy with discipline. They bow to no one who seeks to impose his authority by foreign aid; they hold that science like courage is never beyond the necessity of proof, but must always be ready to prove itself against all challengers. But to one who has shown himself a master, they pay the proud reverence of men who know what valiant combat means, and who reserve the right of combat against their leader, even if he should seem to waver in the service of Truth, their only queen.[340]

Perhaps because they were themselves law teachers and modest men, neither Gray nor Thayer made comparable utterances about their work. Had they done so, it seems likely that they would have described its moral

339. Address to Suffolk Bar Association, 5 Feb. 1885, *quoted in* Posner, *Essential Holmes* 223–24 (cited in note 97).

340. "The Use of Law Schools," Harvard Law School, 5 Nov. 1886, at 37–38 (cited in note 221).

content in terms lacking the Darwinistic and militaristic touches of Holmes. From what we know of them, of their teaching, and of their scholarship, there is no doubt that their aims as teachers were chiefly moral, not technocratic. Gray and Thayer, like Walker and Wythe, if perhaps not Holmes, were among Lieber's "patriots."

The attraction of these patriots to the case method must be at least partly explained by the fact that there is a moral subtext to learning acquired from casebooks and case discussion. An unstated premise of public discussions of law cases, whether conducted in the baths of Rome or on the benches of the Transylvania Law department, or in a modern law school situated in an industrialized society, is that there is for most cases a resolution that is more nearly correct for that time and place than are the other answers proposed. That correct answer is faithful to the pertinent legal texts read in light of the dominant and emergent values of the pertinent culture (in our context, those of a plural democratic society) and serves the longer term interests of the commonwealth. This is the premise of the judicial role to which law students are socialized by the case method.

Discussions having that moral subtext, if sustained over time, do have an effect on students that may prepare them for public service in our republic. Indeed, that morality of civic virtue is not far different from, and certainly is not inconsistent with, the values recently professed by Roger Cramton[341] or Katherine Bartlett[342] or James Elkins.[343]

In fact, few who have experienced it would deny that nine months or so of close reading of legal cases is a morally transformative experience, even for those who do not feel that they have lost their souls.[344] For some at least, the simple, confident idealism of youth is displaced by a more complex, less confident idealism of maturity. Thus, procedural injustice is an evil that American lawyers seem extraordinarily quick to recognize.[345] A part of the reason may be that the case method conditions lawyers to see problems in terms of consequences for individuals and not merely as manifestations of cosmic principles.

If this is so, then it seems that the case method is the method that the generation of American Revolutionaries might have dreamed of. A broadly coherent conception of substantive justice or of economic efficiency cannot become operative in the government they created for us. For they organized our legal system to atomize power, and hence to make law that can often

341. Compare "Beyond the Ordinary Religion," 37 *J. Legal Educ.* 508 (1987).

342. "Teaching Values: A Dilemma," 37 *J. Legal Educ.* 519 (1987).

343. "Reflections on the Religion Called Legal Education," 37 *J. Legal Educ.* 522 (1987).

344. Kronman, *Lost Lawyer* 113–16 (cited in note 9).

345. Barnhizer, 40 *Cleve. St. L. Rev.* (cited in note 12); and see Anthony D'Amato, "Rethinking Legal Education," 74 *Marq. L. Rev.* 1 (1990).

best be understood and explained one instance at a time.[346] What they sought is a profession imbued with what Kronman describes as prudence,[347] and that is what the case method begets.

The moral transformation has several aspects. First, students who work earnestly on cases gain in self-knowledge, a trait essential to moral as well as professional judgment. They are afforded an opportunity to compare their own moral judgments with those of many others, including judges, teachers, and fellow students. They are likely therefore to gain in the discernment of their own moral idiosyncrasies.

Second, students who actively engage in debate about the meaning or significance of cases are likely to become accustomed to withstanding criticism. Moral courage is thus nurtured. The testing of that quality in the law school classroom is one reason for the acute discomfort of many students in that environment. But it is a pain that can yield gain.

Third, students may be helped by the case method to form a sense of professional responsibility for law. Most acquire what Lon Fuller described as a morality of aspiration.[348] The reader of a thousand opinions of the court is likely to gain the impression that judges and other legal decision makers are more often than not, within the limits of their capacities, striving to make decisions that conform to professional expectations and to the general public welfare.[349] What literature better illustrates the possibility of disinterested judgment than persuasive opinions written in the Grand Style of John Marshall? This impression may be fortified when the class discussion of judicial efforts is critical, and proceeds from the premise (generally unstated) that judges can and should be criticized when they indulge themselves or disserve the common interest.

Among the moral precepts to be observed in judicial conduct and shared by students are those Fuller identifies as the morals of law. Opinions are subject to criticism if they lack generality,[350] if their utterances are unclear[351] or self-contradictory,[352] or command the impossible,[353] or are inconstant,[354] or incongruent with the actual application of the lash of power.[355]

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346. Jefferson was as speculative as any member of his generation, yet he was intensely a pragmatist, and on that account it seems likely that he would have been attracted to the case method. Joyce O. Appleby, *Liberalism and Republicanism in the Historical Imagination* 325–27 (Cambridge, Mass., 1992).

347. Kronman, *Lost Lawyer* 86 (cited in note 9).

348. *The Morality of Law* 1–32 (New Haven, Conn., 1964) ("Fuller, *Morality of Law*").

349. For a literate and sensitive account of the difficulty of performing that judicial role in contemporary circumstances, see Frank M. Coffin, *The Ways of a Judge: Reflections from the Appellate Bench* (Boston, 1980).

350. Fuller, *Morality of Law* at 46–49.

351. *Id.* at 63–65.

352. *Id.* at 65–70.

353. *Id.* at 70–79.

354. *Id.* at 79–81.

355. *Id.* at 81–91.

Moreover, little imagination is required for the reader of many opinions to see that this morality of aspiration serves, or at least could serve, a wide variety of substantive aims, if not all.[356] This morality of law is an essential ingredient to the civic virtue acclaimed by Professor Wythe and the classics and to the patriotism of Professor Lieber.[357]

Observing moral conduct in others suggests its possibility on the part of beholders. At least some students are genuinely inspired by the idea of participating in a common enterprise with those who manifestly strive to serve the common interest by adhering as best they can to such an aspirational morality. Even those finding no such inspiration often accustom themselves to a measured expectation of such conduct not only in judges but even in themselves.

One who has gained in self-knowledge, moral courage, and shared commitment to the aspirations of law has become more fit to perform the moral responsibility of the bar than he or she otherwise would be. Those who have assimilated the moral subtext of the case method are better suited than otherwise to deal constructively with human conflict in a democratic society.[358] They are, as Kronman describes, more likely to achieve the qualities of sympathy and detachment that are the ingredients of democratic statesmanship.[359] Or, as Holmes would have it, they are more likely to be "wise in their calling"[360] and "furnish . . . the union of democracy with discipline."[361]

This is not to say, of course, that 20th-century law school graduates have been measurably more patriotic or more willing to sacrifice personal interest to the greater good than were their predecessors, or have more nearly achieved the aspirations of law than previous generations. Public morality is too contextual to permit comparison over time. Nor is it to say that the case method is indispensable or that present law teaching could not be improved with respect to its moral content. Perhaps a genius greater than Langdell will devise a better method. Perhaps better teachers will in the future make better use of his method than have those of the past.

Yet, there are finite limits to what educators can hope to achieve. The legal profession, not the academy, is the most influential moral teacher of law students, and it is in turn subject to powerful moral influences from the

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356. *Id.* at 152–86.

357. Kronman suggests prudence, practical wisdom, and political fraternity as terms that are more precise and more suitable to contemporary discourse. *Lost Lawyer* 11–108 (cited in note 9).

358. It may have been with such principles in mind that Montesquieu (bk. V, ch. 3; cited in note 23) advised the 18th-century Revolutionaries to revere their law if they would maintain a republic; the wisdom of his counsel has not yet been disproved.

359. Kronman, *Lost Lawyer* 113.

360. "The Use of Law Schools" at 35, 39–40 (cited in note 221).

361. *Id.* at 38.

culture it serves.[362] Whether a novitiate will comprehend or accept the moral teaching and as a lawyer practice the wise statecraft that it is the traditional aim of American legal education to nurture is determined by all the cultural forces bearing on the formation of character. If, as Thayer reminded us,[363] the courts cannot protect the republic from moral and political ruin, certainly the law schools cannot. We can say with confidence only that law schools are more likely to be a positive influence on public morality with the case method than they would have been without it. And it is partly for that reason that the case method was a winner with Gray and Thayer and many others.

CONCLUSION

It would be false to report that 20th-century law teaching has fully retained the moral tradition bequeathed by the 19th century. The advent of technocracy of which Langdell was a part has affected the legal profession in countless ways, and many of them seem to have adversely affected the bar's capacity to perform the role envisioned by the Revolutionaries and by such antebellum teachers as Francis Lieber, the Transylvanians, and Timothy Walker.[364]

Moreover, throughout the 20th century, American law teachers have been increasingly socialized to the academic profession, which generally assigns lower priority to the kind of moral education attempted by 19th-century law teachers than to the pursuit of ideological abstractions.[365] As the disjunction between the law school and the legal profession grows,[366] the ability of the schools to influence professional morality has likely declined.[367]

Nevertheless, it is also false to report the death of the received tradition. The moral pedagogy of Wythe has survived in the case method teach-

362. This is the point of Carrington, 41 *Duke L.J.* (cited in note 60).

363. Thayer, 7 *Harv. L. Rev.* (cited in note 145).

364. See generally Abel, *American Lawyers* (cited in note 131); Robert Gordon, "The Independence of Lawyers," 68 *B.U.L. Rev.* 1 (1988); David Luban, *Lawyers and Justice: An Ethical Study* (Princeton, N.J., 1988).

365. I take this as the central point of Kronman's book. *Lost Lawyer* (cited in note 9). He identifies the academic movements to economic analysis of law and to critical legal studies as "neo-Langdellian" initiatives animated by the desire to liberate legal scholarship from the need to cope with practical realities. *Id.* at 225–70. Compare Robert Post, "Lani Guinier, Joseph Biden, and the Vocation of Legal Scholarship," 11 *Const. Commentary* 185, 193 (1994).

366. For an authoritative statement that this is occurring see Bar Task Force (cited in note 311). As Grey, 45 *U. Pitt. L. Rev.* at 53 (cited in note 6), among others observes, the growing disjunction is associated with a reduction of the "gap between legal scholarship and the rest of the intellectual world."

367. For fuller development of this observation, see Harry T. Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession," 91 *Mich. L. Rev.* 34 (1992).

ing of thousands of teachers, and especially in the teaching of those who have brought to their work a genuine ambition to serve the public interest, and who share in the lively and evocative spirit of Barbara Nachtiel Armstrong, or the tough Bixbyesque task-mastering of Charles Hamilton Houston, or the selfless integrity of John Chipman Gray and James Bradley Thayer. For this, Langdell be praised!